SUPREME COURT, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

W.W.W. ENTERPRISES, INC.
d/b/a WILLIAMSON OF HOMESTEAD,

Petitioner,

vs.

JESUS PIDAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MURRAY HUDSON, ESQUIRE
COUNSEL OF RECORD
HOGG ALLEN NORTON & BLUE, P.A.
121 MAJORCA AVE
CORAL GABLES FL 33134

AND

ADAMS & QUINTON, P.A.
80 S.W. 8 STREET, SUITE 2150
MIAMI, FLORIDA 33130
COUNSEL FOR PETITIONER

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QUESTION PRESENTED:

Does St. Mary's Honor Center v. Hicks, __ U.S. __, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), apply to claims under the Americans with Disabilities Act, and if so is it improper for a finder of fact to conclude that the Appellee, Pidal (Plaintiff below) met his ultimate burden of proving discrimination where Appellee was terminated for drinking on the job in violation of company policy, the Appellant, "Williamson Pontiac, Cadillac and Mazda" (Defendant below) was unaware of other employees drinking on the job, and where Plaintiff was re-hired after medical leave with no obligation under law or company policy to do so, prior to the time that Plaintiff was terminated?

LIST OF PARTIES

Rule 29.6 Statement

There are no parties to this proceeding who are not revealed in the caption of this case.

Petitioner, W.W.W. Enterprises, Inc. is a Florida corporation organized and existing under the Laws of the State of Florida. It is owned cooperatively by its members, and its shares are not publically traded.

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STATEMENT OF JURISDICTION

On October 26, 1996, the Appellate Court for the Eleventh Judicial Circuit entered its mandate affirming in part, and reversing in part the Decree of the District Court for the Southern District of Florida and Remanded the cause to the District Court for recalculation of back pay award. On November 18, 1996, Petitioner timely filed a Motion to Recall Mandate.

On December 13, 1996, the Appellate Court for the Eleventh Judicial Circuit denied the Motion to Recall Mandate.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THE CASE

Americans With Disabilities Act of 1990

42 U.S.C. §12102 et seq.

Pertinent text of the Act is set out in the Appendix in accordance with Rule 14(1)(i) of the Supreme Court Rule

STATEMENT OF THE CASE

The Defendant is a corporate enterprise which consists of an automobile dealership in Homestead, Florida doing business as "Williamson Pontiac, Cadillac and Mazda" ("Williamson", "Company"). There are eight (8) Departments within the Company, including, but not limited to, the "Used Car Department." The "Used Car Department" employs a manager, salespersons, and two (2) automobile "porters."

In April 1991, the Defendant employed Mr. Jesus Pidal as one of its two Used Car porters (TR. Vol. 2, pg. 34/25 - pg.36/5).[1]

On February 8, 1992, Mr. Pidal was taken to a local hospital for observation after complaining of chest pains, which were not determined to be a heart attack (TR., Vol. 4, pg. 17/2-25; TR. Vol.

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[1] Citations to the transcript of the trial appear as "TR." followed by the corresponding volume number, the corresponding page number, and a designation of the relevant lines on each page.

2, pg. 38/21- pg. 39/3; pg. 91/4-11). Thereafter, Mr. Pidal did not seek to return to work again until July 1992.

The Company's employee medical leave policy in 1992 provided a thirty (30) day period in which the employee would be maintained on the Company's self-insured health plan as if he or she had not left work. After thirty (30) days, the employee was considered separated from the Company's employ and he or she would be provided the appropriate COBRA notification (TR. Vol. 5, pg. 21/3-9). If the employee returned to his or her position within sixty (60) days, there was no job guarantee, but s/he would be re-employed in either the former position or an equivalent if available; and, should the employee not return until after the sixty (60) day period, there was no employment guarantee but he or she would be given priority in applying for available employment positions (TR. Vol. 5 pg. 21/1-24, & pg. 24/1- 25/5).

During his absence from work, Mr. Pidal admitted himself to hospitals on two other occasions, once after having an argument at home with his son, and eventually underwent arterial bypass

surgery on March 3, 1992 (TR. Vol. 4, pg. 14/16-23). The Defendant extended it's employee medical leave policy for Mr. Pidal beyond the usual thirty (30) day period, to include coverage of his March 3rd surgery under the Defendant's health insurance plan (TR. Vol. 4, pg. 8/11-13 & 23-25).[2]

By all accounts Mr. Pidal's surgery was successful (TR. Vol. 2, pg. 94/24-25). On May 30, 1992 Pidal was examined and informed that he was in "excellent" cardiac condition (TR. Vol. 4, pg. 9/13-20; pg. 10/1-10). In fact, Pidal's physician advised him, "there would be no [cardiac] reason not to go back to work," or otherwise resume his normal activities (TR. Vol. 4, pg. 11/1-8; 9-25, pg. 12/1-6; and, pg. 12/14-19.

Without returning to work, Mr. Pidal again saw his doctor for testing and examination on June 5, 1992 (TR. Vol. 4, pg.

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[2]Mr. Pidal ieft the work place on February 8, 1992; the Company, however, extended Mr. Pidal's coverage under the Company health plan through the end of March 1992 (TR. Vol. 5, pg.20/13-25; Plaintiff's Ex. 3, Company correspondence to Pidal dated 3/19/92, notifying him of COBRA rights effective April 1, 1992).

10/11-14). Pidal again achieved "excellent" test results and the doctor "felt he was in good cardiovascular condition at that time" (TR. Vol. 4, pg. 10/15-20). The doctor "gave no reason he [Pidal] should not go back to work because of his heart" (TR. Vol. 4, pg. 11/1-8). The Plaintiff, however, made no attempt to return to work until sometime in July 1992 (TR. Vol. 5, pg. 45/8-12).

After Mr. Pidal left the workplace in February 1992, the Defendant employed another individual to perform the functions of the second Used Car Porter position. The Defendant's employee medical leave policy provided no guarantee of re-employment beyond thirty (30) days after the initiation of a medical absence, and there is no dispute that all times, the employee hired in February satisfactorily performed his job (TR. Vol. 2, pg. 61/21). Approximately five (5) months after he left the workplace, however, Mr. Pidal sought to return to work at his former position (TR. Vol. 2, pg. 33/22, pg. 34/200, pg. 37/20, pg. 38/6).

There is no dispute that the Company possessed no obligation to re-hire Mr. Pidal at the time he sought to return to

work, and the individual who had replaced the Plaintiff was satisfactorily performing his duties. Mr. Gregory Wurl, the Company's General Manager, felt no obligation to re-hire the Plaintiff but had a "big heart" and wanted to help Mr. Pidal with his employment. Thus, Mr. Wurl requested that Pidal obtain a doctor's release to return to work, a request which the Plaintiff himself admits was reasonable under the circumstances (TR. Vol. 3, pg. 36/20-23).

On July 24, 1992, a doctor Walter L. Bringaze III, provided Plaintiff with a written release expressly stating that Plaintiff was "now able to return to work without restrictions" (TR. Vol. 2, pg. 49/9-15). Not only did the Plaintiff obtain a complete release to return to work "without restrictions", but Mr. Wurl was also informed by Mr. Jorge Mas, Pidal's former supervisor, that he had spoken directly to the office of Pidal's physician and was informed that the Plaintiff was "better than ever." (TR. Vol. 2, pg. 49/11-pg.50/4). Further, Mr. Pidal never requested any accommodation

of any type necessary to perform any employment position with the Defendant (TR. Vol. 3, pg. 38/5-21).

Thus, the Defendant re-hired Mr. Pidal on August 3, 1992, in the same position as he previously held, with the same pay, hours, and working conditions (TR. Vol. 2, pg. 105/20- pg. 106/25). At no time did the Plaintiff inform the Defendant that he was unable to perform any function, duty, or responsibility of his employment, with or without any accommodation (Id., see, also, TR. Vol. 3, pg. 38/25 - pg.39/1).

The Plaintiff's re-employment, however, was possible only after the Defendant transferred the incumbent Used Car porter to another position (TR. Vol. 2, pg. 61/18-20).

Thereafter, on the evening of August 4, 1992, three (3) co-workers saw Mr. Pidal sitting in a company vehicle in a public parking lot, while on duty, and having a drink. The witnesses reported they had seen Pidal drinking a beer (TR. Vol. 2, pg. 52/9 -

14; Vol. 5, pg. 81/10 - pg. 83/18; pg. 76/4-20).[3] There is no dispute that drinking an alcoholic beverage while in a company vehicle, in public and on duty, is a violation of company policy.[4]

Accordingly, Mr. Wurl, on the morning of August 5th, informed the Plaintiff that his employment was terminated due to the beer drinking incident. (TR. Vol 2, pg. 51/21 - pg. 52/1-20).

In spite of the above unequivocal facts, the theory of liability presented by the Plaintiff concerning his ADA claim consisted of

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[3] At trial, Pidal denied that he drank a beer, contrary to Pidal's own sworn affidavit given to the EEOC which admitted such (TR. Vol. 4, pg. 40/20 - pg. 43/14; see also, TR. Vol. 5, pg. 63 - pg. 68/16). The Plaintiff also attempted to show that other employees of the Defendant drank alcoholic beverages while at lunch, but was unable to show that Mr. Wurl was aware of such, or that any such individual was employed in a porter position as Pidal and was witnessed drinking an alcoholic beverage in a company vehicle on a public premises.

[4] On December 31, 1991, the Defendant disseminated a memoranda which explained "misuse of company vehicles or company license plates will be grounds for immediate termination". The rule was in effect as of August 1992 (Defendant's Exhibit 1; TR. Vol. 2, pg. 67/9- pg.68/1). It is undisputed that drinking a beer in a company vehicle while performing a company duty is misuse of a company vehicle (TR. Vol. 2 pg. 68/2-5).

the accusation that Mr. Pidal was terminated from employment on August 5, 1992, because the Defendant perceived that he was a future insurance risk. In an attempt to prove the Defendant was motivated by such a perception, the Plaintiff relied exclusively upon unreasonable opinion, speculation, inferences, and misconstruction of the testimony of Mr. Jorge Mas concerning a couple of conversations about the Plaintiff which occurred prior to the time of any decision to re-hire Mr. Pidal. The Defendant respectfully highlights such testimony below.

TESTIMONY OF JORGE MAS

Each Friday morning, the Company held meetings with its managerial employees wherein the general operation of the dealership was discussed (TR. Vol. 2, pg. 40/19 - pg.41/18; pg. 41/23-25; & pg. 42/7-10). At trial, Plaintiff's counsel asked Mr. Mas to tell the jury what was said concerning Mr. Pidal during the weekly meetings while he was away from work. Mas responded:

> "Basically, on a couple of occasions, how he was doing. On a couple of occasions, what were we going to do

> as far as bringing him back. There were at the time 2 porters existing" (TR. Vol. 2, pg. 42/7-10).

Plaintiff's counsel then questioned: "What else was discussed?", and Mas responded, "That's all -- you know" (TR. Vol. 2, pg. 42/19-20).

Plaintiff's counsel further asked Mas whether, during the staff meetings and prior to the Plaintiff returning to work, the subject of terminating the Plaintiff from employment was ever discussed?" Mas replied, "Not actually terminating him, but well, what were we going to do with a third porter, and was there a need for a third porter" (TR. Vol. 2, pg. 43/6-11)[5].

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[5] Mas was subsequently asked "when" the subject of the Plaintiff's ultimate termination from the company was first brought up and he "guessed" that "it" was July (TR. Vol 2, pg. 44/16-24). Mr. Mas clarified that any such discussion would have occurred before Mr. Pidal was re-hired (TR. Vol 2, pg. 44/21- pg. 45/1, emphasis added). Mas also agreed there was "resistance" on the part of Messrs. Wurl and Victor to bringing back Mr. Pidal (TR. Vol 2, pg. 46/2-15), and testified that "[a]gain, because of the extra employees. Also the health insurance problem" (TR. Vol. 2, pg. 46/16-18). And, Mas testified there was concern Mr. Pidal "cost the company a lot of money, and maybe was not healthy enough to come back and continue his work, and that he may get sick again"

Counsel then asked who brought up the idea of firing the Plaintiff, and Mas testified that he could not "recall."[6] Mr. Mas, however, expressly denied the suggestion that anyone "came up with an idea as to how to get around the Pidal problem." Mas testified: "No, I can't say someone had an idea, but Mr. Wurl wanted to make sure he could continue to work and he asked for a doctor's okay" (TR. Vol. 2, pg. 47/16-20).

On re-direct examination, Mas clarified what he remembered Mr. Wurl saying about Mr. Pidal: "To the best of my memory, what I remember him [Wurl] saying, 'before we even consider letting him return, let's make sure that he can get a doctor's letter that he is going to be able to work out there. See if he can come up with that'" (TR. Vol. 2, 77/13-21; see, also, pg. 78/21-79/3).

(TR. Vol. 2, pg. 46/21-25).

[6] Mas, however, was allowed to speculate, over objection, that "it would have to be" either Mr. Victor or Mr. Wurl (TR. Vol 2, pg. 45/7-14).

Mr. Mas further testified, however, that the Defendant was not obligated to re-hire Mr. Pidal, and Mr. Wurl did not believe he was so obligated (TR. Vol. 2, pg. 60/17-21). Mas also testified that Mr. Wurl had "a big heart" and wanted to help Mr. Pidal by re-employing him (TR. Vol. 2, pg. 61/10-17). The Plaintiff himself admitted that Wurl's request for a medical release was reasonable "due to the circumstances" (TR. Vol. 3, pg. 36/20-23).

THE COMPANY HEALTH INSURANCE PLAN

The Company maintains a self-insured, employee health benefits plan ("Plan"). The Plan was designed by Mr. Gregory Wurl, the Company's General Manager, and the Company's President and CEO, Mr. Edward Williamson, III[7] (TR. Vol. 5, pg. 25/6-11; pg.11/7-20). The individual monthly premium payments for the Plan are determined by an independent organization which conducts a census of the Company's needs and establishes a "premium equivalent" for each employee (TR. Vol. 5, pg. 28/1-12).

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[7] Mr. Wurl deceased prior to the initiation of this litigation. (TR. Vol.5, pg.7/22-24).

The employees contribute the majority of premium payments with the Company off-setting a small portion thereof. (TR. Vol. 5, pg. 28/1-12).

The Plan is designed to accumulate a reserve fund (the employee/employer contributions), which is utilized to purchase an HMO plan that covers health care claims with costs up to, and including, $45,000.00 a year, per employee (TR. Vol. 5, pg. 28/1-12; pg. 30/1- pg. 31/12). The Plan also has independent insurance policy referred to as a "stop-gap policy" which insures health expenses for an employee which exceed $45,000.00 in a single year (TR. Vol. 5, pg. 52/6-11). Thus, the health insurance claims of employees cannot adversely impact the Defendant's health care plan or premium payments (TR. Vol. 5 pg. 62/5-12).

At the end of 1991 and 1992, the Plan's reserve fund had an excess of at least $80,000.00 and $50,000.00, respectively (TR. Vol. 5, pg. 31/19 - pg. 32/3). An employee continues to participate in the plan whether he is paying his share of the premium while employed, or the entire premium while on COBRA (TR. Vol. 5,

pg. 22/10-17). There is no impact upon the plan as a result of any employee paying premium costs while on COBRA (TR. Vol. 5, pg. 22/10-17). Effective April 1, 1992, the Plaintiff paid his COBRA premium for three (3) months (TR. Vol. 2, pg. 96/12-25). Mr Pidal's claims in 1992 - prior to his release to return to work without restriction - did not reach the $45,000.00 level (TR. Vol. 5, pg. 5; pg. 34/14-18).

COMPLETE LACK OF ANIMUS/INTENT TO DISCRIMINATE AGAINST INDIVIDUALS SIMILARLY SITUATED TO THE PLAINTIFF

The Company has employed and re-employed a number of individuals similarly situated to Mr. Pidal, i.e., those who have suffered major medical problems, made insurance claims, and remained or returned to the Defendant's employ.

Mr. Mas testified that during the same Manager Meetings where Pidal was allegedly mentioned, another employee, Mr. Jorge Labrada, was discussed "[b]ecause they were incidents that happened pretty much around the same time" (TR. Vol. 2, pg. 63/1-7). Mr. Jorge Labrada is a fifty-nine (59) year old individual

who was originally employed by the Company in 1990, as an automobile painter (TR. Vol. 5, pg. 69/6-10). On February 2, 1992, Mr. Labrada was severely burned in a fire at his farm, requiring a leave of absence from work and substantial medical treatment (TR. Vol. 5, pg.69/15 - pg. 70/5). At the Company's request, Mr. Labrada received a doctor's release to return "to full job duty", without any restrictions on June 14, 1992 (TR. Vol. 5, pg. 71/3-25).

The Plaintiff's health insurance claims in 1992 charged to the Company Plan totaled $33,000 (TR. Vol. 5, pg. 34/14-18; pg. 41/17-20). Mr. Labrada's health insurance costs for 1992 totaled approximately $45,000.00 (TR. Vol. 5, pg. 37/22 - pg.38/2). On June 14, 1992, Mr. Labrada returned to the Defendant's employ and was offered the opportunity to re-join the company health care plan, but voluntarily chose to utilize the plan established at his wife's place of business (TR. Vol. 5, pg. 72/21-23). Labrada remains employed to date, without incident (TR. Vol. 5, pg. 72/2-6).

In addition to Mr. Labrada, the Company introduced specific evidence of four (4) similarly situated individuals:

> 1) a sixty-five (65) year old New Car salesman who experienced heart problems approximately ten (10) years earlier, and had a re-occurrence in 1991-1992 which required two angioplasty procedures. The individual remains employed even though his medical expenses exceeded the Health Plan's stop-gap policy (TR. Vol. 5, pg. 38/3-25, pg.39/3-4);
>
> 2) a sixty-two (62) year old salesman, diagnosed with cancer in 1991, who remained employed with a reduced work schedule until his death in 1993 (TR. Vol. 5, pg. 48/21-49/1);
>
> 3) a sixty-three (63) year old Service Advisor who suffered a heart attack in 1991 or 1992 and underwent open heart surgery. The individual is currently on COBRA and continues to work with the Company on a reduced schedule (TR. Vol. 5, pg. 40/7-22; pg. 50/2-4); and,
>
> 4) a sixty (60) year old salesman, diagnosed and treated for a "glandular problem", who was re-hired after a six (6) month leave and remains employed (TR. Vol. 5, pg. 40/24-41/9; pg. 50/16-25).

Within a month after Plaintiff left the employ of the Defendant in August of 1992, Plaintiff was hired by Tamiami Chrysler Dodge (hereinafter "Tamiami") in its parts department. (TR. Vol. 4, pg. 30). Plaintiff was informed by his supervisor at

Tamiami, Mr. Mario Fernandez, of his recent heart surgery. (TR. Vol. 4, pg. 33/11-16). Plaintiff that his job did not require him to lift anything heavy, and that other employees would perform such tasks (TR. Vol. 4, pg. 34/17 - pg. 35/13, pg. 35). Plaintiff also admitted that he could take rest breaks whenever he needed. Id. Mr. Pidal, however, voluntarily quit that job approximately six weeks after being hired. (TR. Vol. 4, pg. 30). Mr. Pidal admitted at trial, however, that he knew he would have been eligible for health insurance benefits from Tamiami 90 days after his employment began. (TR. Vol. 4, pg. 31).

At the close of trial, the jury returned a verdict in favor of the Defendant as to the Plaintiff's claim of age discrimination under the Age Discrimination in Employment Act ("ADEA"). The Defendant respectfully contends, however, that because of the Plaintiff's referral to having a "heart attack" while on the job, (TR. Vol. 2, pg. 15/19; pg. 91/18-21); the mischaracterization of the purported statements of Mr. Wurl prior to the Plaintiff's re-employment (TR. Vol. 6, pg. 53 - pg.57); and, Plaintiff's claim that

he was not being able to afford his COBRA payments to continue his health insurance and therefore allegedly incurred substantial medical expenses - even though he testified that he paid his COBRA premiums through June 1992, and had been medically cleared to return to work no later than May 30, 1992 (TR. Vol. 6, pg. 60/6-14; TR. Vol. 2, pg. 96/1-25) - the jury was unduly prejudiced to find for the Plaintiff with respect to his disability claim under the Americans with Disabilities Act of 1990. 42 U.S.C. § 12102 et seq. Thereafter, the Defendant timely filed this appeal.

ARGUMENT

Under St. Mary Honor Center v. Hicks, ____ U.S. at __, 113 S. Ct. at 2747, Federal Courts have held that "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." DeLuca v. Winer Industries, Inc., 53 F.3d 793, 798 (7th Cir., 1995) (applies St. Mary Honor Center) to the ADA); see, also Patterson v. Downtown Med. and Diagnostic Center, 866 F. Supp. 1379 (M.D. Fla. 1994); Hindman v. GTE Data Services, 3 AD Cases 641 (M.D. Fla.1994) (plaintiff must show he is suffering discrimination because of the disability); and, Smith v. Upson County, Ga., 859 F. Supp. 1504 (M.D. Ga. 1994) (plaintiff must show a causal connection exists between the adverse employment action and the disability). The facts presented at trial, however, clearly reveal that no such motivation was proven and there is no evidence of a causal relationship between Plaintiff's discharge on August 5, 1992 and a perceived disability and/or record of disability on the part of the defendant. Plaintiff failed to establish that

Defendant was motivated by a discriminatory intent when Plaintiff was discharged. Furthermore, Plaintiff failed to prove that the legitimate, non-discriminatory reason articulated by the defendant was a mere pretext for discrimination. West v. Russell Corp., 868 F. Supp. 313 (M.D. Ala., 1994) citing Texas Dept. of Community Affairs v. Burdines, 450 U.S. 248 (1981). See, also, St. Mary's Honor Center v. Hicks, ____ U.S. __,__, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

The Defendant's General Manager, Mr. Wurl, and its General Sales Manager, Mr. Leonard Victor, decided to discharge the Plaintiff on August 5, 1992, after being informed by three (3) other employees that they witnessed the Plaintiff during the previous evening drinking an alcoholic beverage, while sitting in a company vehicle in public and on duty, and away from the Defendant's premises (TR. Vol 2, pg. 52/1 - 53/1).

Whether the reports were correct or not is irrelevant because the reports alone were legitimate, non-discriminatory reasons to discharge Plaintiff. The Plaintiff cannot create a genuine issue of

fact by disputing the reports that he was in fact drinking on the job. Brown v. Brown & Williamson Tobacco, 70 FEP Cases 1211 (N.D. Fla., 1996). The evidence in this case indicates that the Defendant's actions were based upon the a legitimate, non-discriminatory reason and there is no evidence that would have allowed a reasonable jury to find otherwise.

The only evidence presented by the Plaintiff concerning the Defendant's alleged wrongful motivation was the testimony of Mr. Jorge Mas, a former Manager for the Defendant who supervised the Plaintiff's work performance (TR. Vol. 2, pg. 33/22; pg. 34/20; pg. 37/20-38/6). Mr. Mas, however, did not make or participate in the decision to discharge the Plaintiff in August 1992 (TR. Vol 2, pg. 51/21 - pg. 52/1-20). Accordingly, the motivation of Messrs. Wurl and Victor concerning the Plaintiff's discharge is determinative.

The Plaintiff attempted to show that other employees of the Defendant drank alcoholic beverages while at lunch, but was unable to show that Mr. Wurl was aware of such, or that any such

individual was employed in a porter position as Pidal and was witnessed drinking an alcoholic beverage in a company vehicle on a public premises.

Mr. Mas' testimony is based upon conversations participated in by Mr. Wurl during weekly manager meetings between February 1992 and the time when Mr. Pidal returned to work. At that time, Williamson was under no obligation to rehire Plaintiff. Plaintiff fails to show how the conversations held prior to his rehiring by the Defendant showed a discriminatory motive or scheme to rehire Plaintiff and subsequently discharge him. Regardless, the Defendants would have had no reason to enter into a discrimination scheme since there was (1) no actual obligation to rehire the Plaintiff, and (2) there was no ADA in effect at the time the statements were made and, therefore, no necessity to enter into a scheme to protect the company therefrom. Mr. Mas testified that during those meetings, Mr. Pidal was a subject of conversation on a couple of occasions, such as "...how he was doing. On a couple of occasions, what were we going to do as far as bringing him

back. There were at the time 2 porters existing" (TR. Vol. 2, pg. 42/7-10). Asked what else was discussed, Mas testified: "That's all -- you know" (TR. Vol. 2, pg. 42/19-20). There was no evidence offered to identify the individual(s) who made such comments.

Mr. Mas was also asked if the subject of terminating the Plaintiff from employment was ever discussed. Mas replied: "Not actually terminating him, but well, what were we going to do with a third porter, and was there a need for a third porter" (TR. Vol. 2, pg. 43/6-11).

The Plaintiff's case is obviously premised upon rank speculation and unreasonable inference drawn from such conversations. When Plaintiff's counsel asked Mas what Mr. Wurl actually said during such meetings concerning Mr. Pidal, the following testimony was adduced:

> "To the best of my memory, what I remember him [Mr. Wurl] saying, 'before we even consider letting him return, let's make sure that he can get a doctor's letter that he is going to be able to work out there. See if he can come up with that" (TR. Vol. 2, pg.

77/13-21; see, also, Vol. 2, pg. 78/21- pg.79/3).

All of Jorge Mas' testimony regarding conversations at manager meetings took place prior to the decision to rehire Jesus Pidal on August 3, 1992. There is no factual evidence that anyone at Williamson believed they had to rehire Mr. Pidal and there is no legal authority requiring Williamson to reemploy Jesus Pidal on August 3, 1992. Once Plaintiff legally separated from Williamson, they were under no legal obligation to rehire Plaintiff. Loper v. American Airlines, Inc., 582 F.2d 956 (5th Cir., 1978). Mas' "manager meeting discussions" were all in the context of how Mr. Pidal's health was doing and whether or not Williamson was going to rehire Mr. Pidal. Regardless of the considerations examined by Williamson during the manager meetings, the decision was made to rehire Jesus Pidal and he began working at the exact same job at Williamson on August 3, 1992. The subsequent act of rehiring Plaintiff negated any inference that the prior conversations evidenced a discriminatory intent.

Jorge Mas' testimony indicates that there were two considerations reviewed regarding whether to rehire Jesus Pidal: (1) Was there a need for a third porter because Williamson employs only two porters and both positions were filled, (two porters/three porters issue); and (2) was Jesus Pidal well enough to physically return to his porter position (Pidal's health to return to work issue). Once again, the evidence shows that the Defendant was assessing his employment needs. This type of information has been found to be "classic 'state of mind' evidence that tended to negate any inference of retaliatory intent." Anderson v. Sheppard, 770 F.2d 165 (6th Cir., 1985).

Attorney Manzini, through his questioning, placed emphasis on Williamson's request to Pidal, prior to reemploying Pidal, that Pidal provide Williamson with a doctor's letter identifying that Pidal is physically able to return to his former porter job without restriction. This request does not provide evidence of

discriminatory motive.[8] Mas' testimony, again which concerned only pre-reemployment manager meeting discussion, falls short of satisfying Plaintiff's ADA burden of proof. Attorney Manzini asked Mas "Did somebody come up with an idea as to how to get around the Pidal problem?" (Attorney Manzini never asked who said what.) Mas answered:

> A: No, I can't say somebody had an idea, but Mr. Wurl wanted to make sure he could continue to work and he asked for a doctor's okay. (TR. Vol 2; pg. 47)

On redirect, attorney Manzini again inquired about Williamson's request for a doctor's letter and Mas, attempting to quote Mr. Wurl, stated:

> "...Hey, let's get a letter from his doctor making sure he can come back to work, and if he can get that, okay, and if not, that would be the end of it right there." (Emphasis provided.) (TR. Vol 2; pg. 82)

---

[8] Mr. Pidal admitted that the request for a doctor's release to return to work was reasonable under the circumstances. (TR. Vol. 2; pg. 1).

Pidal got the doctor's letter and therefore according to Mas it was "okay", and Pidal was reemployed beginning August 3, 1992 (TR. Vol. 2, pg. 82). Significantly, Williamson followed the same procedure regarding George Labrada who had also suffered a severe health problem in February 1992 and sought reemployment in July 1992. George Labrada, who was also in his late fifties, and who had higher health care claims, obtained a doctor's release and remains employed by Williamson today.

Therefore, upon obtaining the doctor's statement allowing him to return to work, Plaintiff was rehired by Defendant while he was under no legal obligation to do so. Soon, thereafter, the Defendant received three reports by the Plaintiff's fellow employees that the Plaintiff was drinking in a company vehicle while on duty. Based upon these reports, the Defendant discharged the Plaintiff for a legitimate, non-discriminatory business reason.

Assuming, arguendo, that the above statements showed a discriminatory motivation, the subsequent rehiring would negate any

inference of discrimination. Since it is undisputed[9] that the Defendant's were under no obligation to rehire Plaintiff and the statements by Defendant were made prior to the Plaintiff's rehiring, any discriminatory motivation would have easily been implemented by not rehiring Plaintiff. Mr. Mas admitted that at the time the Defendant re-hired the Plaintiff in August, there were no discussions concerning finding a reason to let Pidal go or to make him quit (TR. Vol. 2, pg. 69/21-70/17). In fact, the Plaintiff never told Mas, or anyone else, that he possessed any disability, and it is undisputed that Pidal never requested any accommodation or assistance with the performance of his duties upon his re-hire (TR. Vol. 2, pg. 68/6-11; Vol. 3, pg. 38/16-pg. 39/2). However, once he was rehired, that fact alone negates the inference of

---

[9] Mas admitted the Defendant had no obligation to re-hire Mr. Pidal at the time he inquired about returning to work. Mas also acknowledged that Greg Wurl never indicated that he believed he was obligated to re-hire the Plaintiff, but that Wurl had a "big heart" and wanted to help Mr. Pidal by providing him with employment at the time he sought to return (TR. Vol. 2, pg. 61/10 -17).

discrimination by placing Plaintiff in a better position after the conversations the Plaintiff offers as evidence to show discriminatory intent. Similarly, in an EEOC decision, the committee reasoned that an employee who received a pay raise subsequent to a claim filed with the EEOC would negate an inference that the employer discriminated against the employee based upon the EEOC claim prior to the pay raise. (EEOC Decision No. 75-058) Furthermore, Defendant extending the Plaintiff's medical coverage further evidences that Defendant had no discriminatory motivation. The Plaintiff contends that the conversations several months before his rehiring establish the requisite causal connection. However, it is well settled that a causal connection is "demonstrated by the proximity of the adverse action to the protected activity." The Plaintiff's surgery in March 1992 is not within the proximity of the August 1992 discharge, especially since the Defendant was under no legal duty to rehire Plaintiff.

In a similar case, Szymanska v. Abbott Laboratories, 3 AD Cases 748 (N.D. Ill. 1994), two employees brought suit against

their former employer alleging, inter alia, claims of disability discrimination under the ADA. One of the employees (Ms. Pietraszewski) had a history of hospitalization and surgery for the treatment of kidney cancer and was subsequently discharged by two company officials who had knowledge of her health condition. The employee asserted her employment was terminated because she was "perceived" to be handicapped. Summary judgement was granted on behalf of the Defendants, however, because the employee had returned to work, without restriction or incident, subsequent to her hospitalization. The court stated, "Her past condition and past hospitalization does not, without more, indicate any impairment or history of impairment that substantially limits any of her major life activities. Significantly, there is no evidence that her activities were impacted by her cancer prior to her surgery and no evidence that she requested any accommodation after her surgery and sick leave." Id. at 761. Like Ms. Pietraszewski, Mr. Pidal presented no evidence that his health had any impact on his life activities prior to his leave in February 1992, and there is no evidence that Mr.

Pidal's health affected any major life activity after his return from surgery (Pidal received a clean bill of health as of May 30, 1992). Pidal also admits he never sought, nor needed, any accommodation after his recovery.

As in Pidal, the Defendant in Szymanska was also charged with having made comments regarding the plaintiff's health problems and their impact on her work. Specifically, the plaintiff alleged that a supervisor who visited her in the hospital after her kidney surgery asserted that the problems the Defendant had with her work performance "are related to her health problems." Id. at 753. The court, however, held that such stray remarks were insufficient to indicate the defendant perceived her as handicapped. Id., 3 AD cases at 760-761.

Similarly, the facts of this case reveal the Plaintiff failed to establish any causal relationship between his alleged disability and his ultimate discharge, subsequent to his August 1992 re-hire. Further, the comments actually attributed to Mr. Wurl, and any reasonable inference to be drawn therefrom, are insufficient to

prove the Defendant was illegally motivated when discharging Mr. Pidal on August 5, 1992.

The preceding is the extent of factual evidence presented by the Plaintiff concerning the Defendant's motivation for discharging Mr. Pidal on August 5, 1992, allegedly because of his disability, record, or perception thereof. There is simply no competent evidence, however, which indicates the Defendant's motivation for terminating Mr. Pidal's second period of employment was based upon, even in part, a disability, perception/record of such, or any alleged fear of an adverse effect upon the Defendant's health insurance plan.

Therefore, Plaintiff cannot meet its burden of showing that Williamson pretextualy terminated Pidal for drinking on the job and actually terminated Pidal for a discriminatory reason.

CONCLUSION

For the foregoing reasons, Peetitioner, W.W.W. Enterprises, Inc., respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

MURRAY HUDSON, ESQUIRE
COUNSEL OF RECORD
HOGG ALLEN NORTON
& BLUE,P.A.
121 MAJORCA AVE
CORAL GABLES FL 33134

ADAMS & QUINTON, P.A.
80 S.W. 8 STREET, SUITE 2150
MIAMI, FLORIDA 33130
COUNSEL FOR PETITIONER

FILED

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DOCKET NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

W.W.W. ENTERPRISES, INC.
d/b/a WILLIAMSON OF HOMESTEAD,

Petitioner,

vs.

JESUS PIDAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MURRAY HUDSON, ESQUIRE
ATTORNEY FOR PETITIONER
HOGG ALLEN NORTON & BLUE, P.A.
121 MAJORCA AVE
CORAL GABLES FL 33134

ADAMS & QUINTON, P.A.
ATTORNEYS FOR PETITIONER
80 S.W. 8 STREET, SUITE 2150
MIAMI, FLORIDA 33130

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UNITED STATES DISTRICT COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-5102

D.C. Docket No. 93-0879-CIV-DLG

JESUS PIDAL, Plaintiff-Appellee,

versus

W.W.W. ENTERPRISES, INC., a Florida corporation d/b/a WILLIAMSON OF HOMESTEAD, Defendant-Appellant.

No. 95-5427

D.C. Docket No. 93-879-CIV-GRAHAM

JESUS PIDAL, Plaintiff-Appellee,

versus

WILLIAMSON CADILLAC COMPANY, a Florida corporation and COMMUNITY BANK OF HOMESTEAD, Defendants,

W.W.W. ENTERPRISES, INC., a Florida corporation, d.b.a. Williamson of Homestead, Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and REAVLEY*

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby AFFIRMED in part and REVERSED in part; and that these causes be and the same are hereby REMANDED to said District Court for recalculation of back pay in accordance with the opinion of this Court;

It is further ordered that each party pay their own costs on appeal.

*Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Entered: September 19, 1996
For the Court: Miguel J. Cortez, Clerk

By: s/s

Deputy Clerk

ISSUED AS MANDATE: 10/25/96

IN THE UNITED STATES DISTRICT COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-5102

D.C. Docket No. 93-0879-CIV-DLG

JESUS PIDAL, Plaintiff-Appellee,

versus

W.W.W. ENTERPRISES, INC., a Florida corporation d/b/a WILLIAMSON OF HOMESTEAD, Defendant-Appellant.

No. 95-5427

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WILLIAMSON CADILLAC COMPANY, a Florida corporation and COMMUNITY BANK OF HOMESTEAD, Defendants,

W.W.W. ENTERPRISES, INC., a
Florida corporation, d.b.a.
Williamson of Homestead, Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(September 19, 1996)

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and REAVLEY*

PER CURIAM:

After Plaintiff-Appellee Jesus Pidal was terminated from employment by Defendant-Appellant W.W.W. Enterprises, inc. (Williamson), he filed this action alleging he was terminated because of his age, in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621 et seq. (1994), and because of his disability, in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101 et seq. (1994). Both claims were submitted to the jury. Although the jury found

*Honorable Thomas M. Reavley, Senior U.S. Circuit Court Judge for the Fifth Circuit, sitting by designation.

for Williamson on the ADEA claim, it found for Pidal on the ADA claim and awarded medical expenses as well as compensatory and punitive damages. Pidal filed a motion for additur for back pay and a separate motion for attorney's fees an costs. Williamson filed a motion for judgment as a matter of law, seeking a reduction of the compensatory and punitive damages award and of the medical expenses award. The district court granted Pidal's motions for additur and for attorney's fees and costs and Williamson's motions for reduction of compensatory and punitive damages and for reduction of the medical expenses award as to the Worker's Compensation benefits, but denied Williamson's motion for reduction f the medical expenses award as to Pidal's failure to mitigate. Williamson appeals the jury verdict for Pidal on the ADA claim (No. 94-5102) and, separately, the district court's grant of the motion for attorney's fees and costs (No. 95-5427).[1] The appeals

[1]Both parties agree that this Court's resolution of the appeal of the jury verdict is dispositive as to the award of attorney's fees and costs. Because we affirm as to the jury verdict, we also affirm as to the award of attorney's fees and costs and deny as moot Pidal's

were consolidated. We affirm in part, reverse in part, and remand for a recalculation of back pay.

We write to address the issue of whether Pidal is entitled to medical expenses and back pay after the date he began receiving Social Security disability benefits.[2] Pidal asserts that this issue was not preserved for appeal. Williamson counters that the issue was raised in response to Pidal's motion for additur as well as during a sidebar at trial.

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motion to dismiss appeal No. 95-5427. Pidal's motion for attorney's fees and costs on appeal is denied.

[2]Williamson also raises the following issues on appeal: (1) whether the evidence was sufficient to support the jury's finding that Williamson discriminated against Pidal on the basis of his disability; (2) whether the district court erred in allowing Pidal's key witness George Mas to testify as to his personal opinion; (3) whether the district court erred in allowing Pidal's counsel to refresh Mas' memory by using a prior statement made by Mas; and (4) whether the award of back pay and medical expenses should be reduced because of Pidal's failure to mitigate his damages. We affirm the district court as to these issues. See 11th Cir. R. 36-1.

This Court generally will not consider an issue raised for the first time on appeal. Formby v. Farmers and Merchants Bank, 904 F.2d 627, 634 (11th Cir. 1990). Issues not raised during trial, however, may be preserve for appeal if they are raised before the district court in a post-trial motion. See Roush v. KFC Nat'l Management Co., 10 F.3d 392, 397 (6th Cir. 1993), cert.denied, 115 S.Ct. 56 (1994).

A careful review of the record reveals that the issue of Pidal's entitlement to damages after he began receiving Social Security disability benefits was preserved as to back pay but not as to medical expenses. The record clearly indicates that Williamson did not argue before the district court, either during trial or in post-trial motions, that Pidal's medical expenses should be limited to the time prior to when he began receiving Social Security disability benefits. Whether Williamson argued that backpay should be limited is less clear.

At trial, when the issue of Pidal's receipt of Worker's compensation benefits arose, the district court held a sidebar

discussion with counsel regarding how the Worker's Compensation release should be handled. Nothing was resolved during the initial discussion on June 1, 1994.[3] After the trial resumed on June 2, 1994, but prior to the return of the jury, the court stated that case law filed by counsel supported the position that an offset of Worker's Compensation benefits against any damages awarded was "something [the court] could decide or handle at the conclusion of the trial and it wouldn't be necessary to spend time with this issue before the jury." Prior to the charge conference, the district court again discussed with counsel the issue of the Worker's Compensation release, stating the jury would be instructed "to the effect [that] if they determined damages are appropriate, they should not consider any testimony regarding Worker's Compensation claims, et cetera. I will handle that as a motion for remittur." Williamson's counsel indicated that he needed to review Pidal's

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[3]It was 2:50 and the court had previously announced that proceedings in the case would end for the day at 2:55.

testimony as "there are a lot of potential issues as to when his damages may have been cut off with respect to his subsequent employment."[4] Counsel further indicated that he was not sure how to handle the matter with regard to jury instructions. The court initially indicated that the issue of cutting off damages, like the issue of the Workers' Compensation benefits, should be "argue[d] in y our motion for remittur" but then stated that only testimony regarding the money received as Workers' Compensation benefits

---

[4]At the beginning of trial, in discussing a motion to use newly discovered evidence, Williamson's counsel indicated that he had learned of Pidal's subsequent employment only 3 days before trial. During his deposition, taken in December 1993, several months before trial, Pidal denied any subsequent employment and further denied that he had sought subsequent employment. At trial during direct examination, Pidal testified that he started receiving social Security disability benefits in January 1994. During his deposition, Pidal stated he had applied for disability benefits but had been denied. It is unclear when Williamson first learned of Pidal's Social Security disability benefits.

In addition to the apparently conflicting testimony, Pidal testified through interpreters both at trial and at his deposition. This created problems and confusion because Pidal apparently speaks some, although very limited, English, counsel for Pidal speaks Spanish, and counsel for Williamson apparently speaks no or very limited Spanish.

would be handled by an instruction to the jury. In giving the charge as to the ADA claim, the district court instructed the jury not to "consider any back-pay the plaintiff lost. The award of back-pay, should you find the defendant liable, will be calculated and determined by the Court." A fair reading of what happened is that the district court told the jury, and counsel, not to worry about the calculation of back pay under the ADA as the court would handle the calculation on motion for remittur.

In response to Pidal's motion for additur of back pay, and in reference to Pidal's testimony that he received Social Security disability benefits because of his inability to work, Williamson argued that Pidal "is not entitled to any back pay recovery from any time that he has been determined unable to work because of a disability." Williamson also noted: "Should the Court determine that Plaintiff is entitled to any back pay for any time in 1994, the Defendant respectfully asserts that the amount of disability benefits Plaintiff claims to have received on a monthly basis since January 1994 should be offset from such an award." Under the

circumstances of this case, Williamson preserved for appeal the issue of whether Pidal was entitled to back pay for the time during which he received Social Security disability benefits.[5]

"No covered entity shall discriminate against a qualified individual with a disability because of the disability...in regard to... discharge of employees. 42 U.S.C. §12112(a). "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). A plaintiff who is unlawfully terminated in violation of the ADA has a duty to

---

[5]In addressing Williamson's motion for judgment as a matter of law, the district court offset the Workers' Compensation award against the jury award for medical expenses. Williamson did not raise the issue of whether Pidal's Social Security disability benefits should limit or be offset against the award for medical expenses, and the court did not address the issue. Although Williamson raised the issue of whether Pidal's Social Security disability benefits should limit or be offset against an award of back pay, the court, in addressing Pidal's motion for additur, not only made no factual findings regarding the issue, but did not address the issue in any manner.

mitigate damages by being reasonably diligent in seeking, as well as ready, willing and available to accept, a position substantially equivalent to the position lost. See Miller v. Marsh, 766 F.2d 490,492 (11th Cir. 1985).

At trial, Pidal testified that he had made no real effort to look for a job since December 1993. He further indicated that he was too ill to work, "otherwise I wouldn't have gotten the disability." In response to a follow-up question as to whether he had looked for a job since December 1993, Pidal responded, "I am telling you that I have been ill."

Pidal did not seek employment after he began receiving Social Security disability benefits in January 1994 and was not ready, willing, and available to accept a position. He was to, therefore, a "qualified individual with a disability" and is not entitled to back pay for the time during which he received Social Security disability benefits.

AFFIRMED in part, REVERSED in part, and REMANDED for a recalculation of back pay in conformance with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-0879-COV-GRAHAM

JESUS PIDAL,

Plaintiff,

vs.

W.W.W. ENTERPRISES, INC., a Florida corporation d/b/a WILLIAMSON OF HOMESTEAD,

Defendant.
_____/

JUDGMENT

THIS ACTION came on for tiral before the Court and a jury, Honorable Donald L. Graham, District Judge, presideing, and the issues having been duly tried and the jury rendered its verdict. The Court having ruled on the post-trial motions, it is

ORDERED AND ADJUDGED that judgment be, and the same is, hereby entered in favor of the Plaintiff, Jesus Pidal, and against the Defendant, W.W.W. Enterprises, Inc. d/b/a Williamson of Homestead, in the sum of $29,920.00 representing back pay,

$50,000.00 representing compensatory and punitive damages and $25,000.00 fr medical expenses.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of September, 1994.

s/s
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

VOL. 2-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

JESUS PIDAL,

Plaintiff,

-vs-

CASE NO. 93-0879-CIV-DLG

Miami, Florida
May 31, 1994

W.W.W. ENTERPRISES, INC.,
a Florida corporation,

Defendant.
_____/

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE DONALD L. GRAHAM
and a jury
VOLUME 2

APPEARANCES:

For the PLAINTIFF: NICOLAS MANZINI, ESQ.
and
ALEXANDER AKPODIETE, ESQ.

For the DEFENDANT: EDWARD A. QUINTON, III,ESQ.
and
MURRAY HUDSON, ESQ.

Court Reporter: Barbara Medina
Federal Justice Building
99 Northeast 4th Street
Suite 1067
Miami, Florida 33132
(305) 358-4642

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

deliberation room, and begin your deliberations.

Are there any requests for additional opening instructions?

MR. MANZINI: No, sir.

THE COURT: Let's now present our opening statements.

MR. MANZINI: Thank you. May it please the court.

my name is Nicholas Manzini, and this is my associate Alexander Akpodiete. This was Mr. Jesus Pidal, he is the plaintiff in this case. It's on his behalf I stand before you this afternoon.

The nature of this case is for employment discrimination. Mr. Pidal went to work at the Williamson dealership in Homestead on April 8 of 1991, he was hired as

a porter. He drives cars around the new and used car lots, he cleans cars, he puts them back in place. It's time consuming, it's tedious. Mr. Pidal was at that time 59 years of age.

On February 8, 1992 Mr. Pidal suffered a heart attack while on the job. He was taken from there to a hospital in Homestead and subsequently, he was admitted at Baptist Hospital. On March 2, 1992 Mr. Pidal underwent quadruple heart bypass surgery.

As you probably know, and those of you who are fortunate enough to have gone through something like that,

discriminates against its employees for age, neither do they discriminate against their employees based on a disability.

Thank you.

THE COURT: Call your first witness.

MR. MANZINI: George Mas.

GEORGE MAS, PLAINTIFF'S WITNESS, SWORN

MR. MANZINI: May I proceed.

THE COURT: Certainly.

MR. MANZINI: Can everyone hear me? I am not using the microphone. I want to make sure I am getting to everybody.

DIRECT EXAMINATION

BY MR. MANZINI:

Q Please state your name?

A George Mas.

THE COURT: Spell your last name.

THE WITNESS: Spell my last name?

THE COURT: Yes.

THE WITNESS: M-A-S.

Q How old are you?

A 38.

Q Do you know Mr. Pidal?

A Yes.

Q How did you meet Mr. Pidal?

A He came to me looking for a job, and I hired him.

Q Was that in April of 1991?

A Dates I don't remember.

Q If I showed you his job application, would that help refresh your memory?

A Yes.

MR. MANZINI: Excuse me, Judge. It hasn't been marked for identification.

Should we do that?

THE COURT: Yes.

MR. MANZINI: How do we do this?

THE COURT: It should be premarked.

MR. MANZINI: They are not.

We will refer to this as Plaintiff's 1. We will mark it before we move it into evidence.

BY MR. MANZINI:

Q Mr. Mas, is this the job application Mr. Pidal filed with you?

A. Yes.

Q What is the date on the application?

A April 4, '91.

MR. MANZINI: We would like to move this into evidence.

THE COURT: Any objection to Plaintiff's 1 for identification?

MR. HUDSON: No objection.

THE COURT: Received as marked.

BY MR. MANZINI:

Q What was his position that he was hired for?

A At the time I was used-car manager. He would be my porter for my department.

Q What does a porter do?

A A porter parks cars, washes cars, is a go-fer, takes care of things. Whatever needs to be accomplished.

Q Is it a daily job?

A Yes.

Q How many hours a day, on the average?

A That could vary, but typically a pretty long day usually, from 9:00 in the morning until 6:00, 7:00 at night, typically.

Q 11,12 hours. 10, 11 hours?

A Yes.

17	Q	Is that how many hours a day Mr. Mas usually worked?
18	A	Your question again?
19	Q	That how many hours a day Mr. Pidal usually worked?
20	A	Yes.
21	Q	How many days a week?
22	A	Six days a week.
23	Q	Monday through Saturday?
24	A	Yes.
25	Q	And the dealership is closed on Sundays.

A The dealership at one time was closed on Sundays, and another time it was also open 7 days. Usually it ran without a porter on Sunday.

Q When you first hired him, was he being paid an hour wage?

A Yes.

Q Do you recall offhand how much that was?

A No, I do not.

Q Subsequently, did you ask him to go on a salary?

A There as a time, and again I don't know the dates, that my superior, Mr. Wurl, asked me to ask him if he would go on salary.

Q Why did you do that. Why did Mr. Wurl, the owner of

Williamson, ask you to do that?

A We were trying to get cost.

Q You wanted to pay him less?

A I would say we were willing to cut costs.

MR. QUINTON: I am going to object. State of mind,

thinking what --

MR. MANZINI: I will withdraw.

BY MR. MANZINI:

Q Did he continue to work on a salary?

A Yes.

Q Was he taking a pay cut?

A Yes.

Q He was making more money on the hourly wage?

A Because of overtime.

Q Do you recall when you switched from an hourly wage to a salary?

A No.

Q How was his work?

A Excellent.

Q That can mean things to different people. Be more descriptive.

What do you mean by "excellent?"

A He showed up for work every day, he was early or on time. Really no problems out of him. He did anything I asked or anything that was necessary to accomplish his job.

Q Did he ever refuse to carry out any of your instruction?

A No.

Q Did he ever refuse to carry out anybody else's instructions?

A None that I can remember.

Q You were his immediate supervisor?

A Yes.

Q You found his work to be satisfactory?

A Yes.

Q Were there any bad reviews?

A No.

Q From any other manager at Williamson?

A Not to my memory.

Q Or from Mr. Wurl himself?

A No.

Q Your position at the time was what?

A Used-car manager.

Q Tell the jury what a used car manager does or what it comprises?

A Appraisals of vehicles, reconditioning of the used cars, desking deals.

In other words, the guy that has to take the offers from the customers, say "yes" or "no". Supervision of salespeople.

Q Okay.

Did there come a time Mr. Pidal got sick.

A The day of the heart attack?

Q Yes, sir?

A Yes.

Q Were you there?

A Yes, I was.

Q Tell us what happened?

A I remember -- all I remember is that he came in the showroom. He was complaining of pain, and someone called the rescue, the 911.

Q Pain in his chest?

A Yes, and they took him away.

Q Did you see him while this episode was ongoing?

A I saw him sitting in a chair. He didn't look very well.

Q How old was he at the time?

A I do not know.

Q 59. It was about a year after you hired him?

A Yes.

Q What happened next?

A He was -- I heard he had a heart attack and he was under care. He was in the hospital or something.

Q Okay.

Were you advised that he had a quadruple heart bypass surgery?

A Yes I remember hearing that.

Q Okay.

Was he gone from Williamson for several months?

A yes.

Q His status was technically on medical leave, isn't that correct?

A Yes, yes, that's correct.

Q He was not terminated because he got sick?

A No.

MR. QUINTON: I object to the leading questions of counsel.

THE COURT: Overruled.

MR. QUINTON: Thank you, Judge.

BY MR. MANZINI:

Q So, technically, was he still working at Williamson, although not physically there?

A Well, we never made a determination as to -- you know, it was kind of like an in-limbo thing.

Q Sure.

He was gone from the position about six months give or take a day or two?

A Yes.

Q If I need to --

A My dates are --

Q February 8 was the heart attack?

A Yes.

Q He came back to work August 3?

A Thereabouts.

Q That's 6 months minus 5 days, give or take?

A Yes.

Q During that time were there meetings of the managers,

including yourself, that were held at Williamson?

A Yes, we had a weekly staff meeting on Friday.

Q That's a practice Williamson had for several years,

isn't that correct?

A As far as I know, this was done at the Dadeland store

every Friday, and the same thing continued here.

Q Who was present at those meetings?

A All the managers were typically there. Occasionally one would not be there.

Q Managers --

A The finance manager, the general sales manager, used-car manager, new-car manager, service manager, body-shop manager.

Q As well as Mr. Wurl?

A Yes, the comptroller.

Q Generally what was discussed at these meetings?

A Anything dealings with the operation of the dealership. It could be policy, typically a review of the month's figures, how are things going.

A Personnel matters?

A Yes.

Q Pertaining to a particular employee?

A yes, anything at all to do with the running of the dealership.

Q These meetings were every Friday?

A Yes.

Q About what time?

A 8:00 a.m.

Q Was Mr. Pidal discussed while he had been gone the six months?

A Yes.

Q Tell the jury what was said during the discussions concerning Mr. Pidal.

MR. QUINTON: I object to the narrative form of the question, Judge.

THE COURT: Overruled.

A Basically, on a couple of occasions, how he was doing.

On a couple of occasions, what were we going to do as far as bringing him back. There were at the time 2 porters existing.

Q That would be Mr. Lewis, the 27-year-old guy?

A Ron Bryant.

Q How old is he?

A I don't know.

Q Younger than Mr. Pidal?

A Yes.

Q Younger than the age of 40?

A Yeah.

Q What else was discussed?

A That's all -- you know.

Q Let me ask you a direct question.

Was the subject of terminating Mr. Pidal ever brought up during that time.

MR. QUINTON: I object.

The witness has said that's all he can remember.

It has been asked and answered.

THE COURT: Overruled.

BY MR. MANZINI:

Q You may respond.

A The question again, please?

Q During those staff meetings, before Mr. Pidal even returned to work, was the subject of terminating him from his employment ever discussed?

A Not actually terminating him, but well, what were we going to do with a third porter, and was there a need for a third porter.

Q It has been a long time since I took your statement. I think we are sitting outside your home being rebuilt after* the hurricane we were in a trailer.

MR. QUINTON: I object.

MR. MANZINI: I want the witness to recall.

MR. QUINTON: Mr. Manzini is getting ready to use a statement to impeach or correct his own witness.

MR. MANZINI: Refresh his memory --

THE COURT: Overruled.

MR. MANZINI: -- with that statement, of which counsel has a copy.

MR. QUINTON: I also object to Mr. Manzini reading what the statement says, at any point, to the jury.

THE COURT: If you are going to refresh his

recollection, do it the correct way. Show him the statement, and ask him the question you want to ask, and see if it refreshes his recollection.

MR. MANZINI: You want me to show him the statement first, Judge?

BY MR. MANZINI:

Q I would like you to -- Mr. Mas, it has been a long time, at least a year and a half -- starting at page 18 line 15, if you would, read the question that I asked you and the answer that you gave.

MR. QUINTON: What page are you on?

MR. MANZINI: 18.

MR. QUINTON: What line?

MR. MANZINI: 15.

BY MR. MANZINI:

Q Does that refresh your memory as to when the subject of plaintiff Pidal's ultimate termination from the company was first brought up?

A Yes.

Q When was it first brought up?

A It was nearing -- I am guessing July, because I am not very good with dates. I am guessing it was a few weeks prior to August when I know he had contacted me, Mr. Pidal, about returning.

Q It was before he went back to work?

A Yes.

Q Who brought up the idea of just firing him.

Was that Mr. Wurl?

MR. QUINTON: Judge, I object.

THE COURT: Sustained.

BY MR. MANZINI:

Q Who brought up the idea of firing him?

A I don't recall it would have to be just because of, typically, how it worked. It would have to be one of the managers. It was either the general sales manager --

MR. QUINTON: I object to speculating.

THE COURT: Overruled.

A Either the general sales manager, Len Victor, or Mr. Wurl.

A Do you recall specifically what was said. I mean, "let's get rid of him," and somebody said, "we better not"?

MR. QUINTON: I object.

THE COURT: Just ask him if he recalls what was said.

MR. MANZINI: I'm sorry.

BY MR. MANZINI:

Q Do you recall specifically what was said about terminating him or getting rid of him?

A I recall that it was a dilemma as far as bringing back Mr. Pidal because of a third porter, because also they

wan[illegible] to make sure his health was good, et cetera.

Q Was there some resistance to bring him back?

A Yes.

Q On whose part?

A Mr. Wurl's.

MR. QUINTON: I object. He is getting into --

THE COURT: Just give me a legal basis.

MR. QUINTON: State of mind. He has not asked him

"what did he say?"

THE COURT: Overruled.

MR. QUINTON: There is no foundation.

THE COURT: Overruled.

BY MR. MANZINI:

Q On whose part was there a resistance to bring him back?

A I would say mr. Wurl and Mr. Victor.

Q Why were they resisting the idea of bringing him back?

A Again, because of the extra employees. Also the health-insurance problem.

Q What was the health-insurance problem, so that the jury and Court can hear?

A As always, things were discussed.

There was a concern he had cost the company a lot of money, and it was, you know, he wasn't -- maybe not healthy in order to come back and continue his work, and that he may get sick again or something.

Q And cost more insurance costs.

MR. QUINTON: Judge, I object to leading.

THE COURT: Sustained.

BY MR. MANZINI:

Q Was there a concern, if he came back, he might get sick again and drive up the insurance costs?

A There was a concern, since we were self-insured, it might -- actually we were expecting a decrease in out monthly premium, and that didn't occur.

Q Was there a similar concern with the 27-year-old employee that replaced him, that he -

A That was never discussed.

Q He was not a worrisome situation for the company?

A No.

Q Okay.

Now, what happened, next? Did somebody come up with

an idea as to how to get around the Pidal problem?

A No, I can't say someone had an idea, but Mr. Wurl wanted

to make sure he could continue to work and he asked for a

doctor's okay.

Q Were you in a meeting when that was brought up,

requesting t he doctor's okay?

A Yes.

Q Was it said that it was unlikely Mr. Pidal could get a

release from his doctor.

BY MR. MANZINI:

Q How long did it take?

A I don't know.

Q Was it a week? Was it two weeks?

MR. QUINTON: I object.

A I don't remember.

THE COURT: Overruled.

Next question.

Q Was it you that communicated with Mr. Pidal?

A Yes.

Q What did you say to him when you finally got back to him?

A I asked him "we need a doctor's okay for him to return, we needed it in the form of a letter so he would be clear to come back." We told him we didn't want him to go --

Q Go back to work and get sick?

A And have another problem.

Q Did he get you such a letter?

A Yes.

Q Mr. Mas, is this the letter on Mt. Sinai Hospital stationery that Mr. Pidal brought you?

A Yes.

MR. MANZINI: I would like to move this into evidence as Plaintiff's 2.

MR. QUINTON: Can I see it?

MR. MANZINI: Oh, sure.

MR. QUINTON: No objection, Judge.

THE COURT: 2 for identification is received as marked.

BY MR. MANZINI:

Q How long after Mr. Pidal brought you that letter did you tell him he could come back to work.

A Pretty soon after that. I don't recall how many days after but pretty soon after that he started back to work.

Q Did you see him on his first day back to work?

A Yes.

Q Do you remember what time he got there?

A No, I don't.

Q Would it have been his usual time?

A It would have been early.

Q Before 9:00?

A Yes.

Q Did he work a full day?

A Yes.

Q What -- did he resume doing his old job?

A Just like always.

Q Was that August 3, 1992?

A Again, the date I don't recall the date.

Q From your recollection was that an unusually heavy day or light day or average?

A I'm sorry, I don't remember.

Q As far as you recall, did he do his work properly that day?

A Yeah, I mean, he always did his work properly.

Q And then he came back the next day, August 4?

A Yes.

Q Did you see him that day?

A I don't remember exactly how many days I saw him one after another. He was on a schedule, and he would come to work, but I don't recall.

Q Do you recall whether he did his work properly on August 4, the second day that he was there?

A As I said, any day he worked, he did his job properly.

Q No complaints from anyone?

A No complaints. That's just about the way he was, you know.

Q Were you there on the evening of August 4?

A Again, dates I just don't know. Typically, I would work into the evening hours. If I was working that day, yes, I was there.

Q Do you recall what happened that night the incident that was reported by Mr. Gallinda and someone else?

A The only thing I know, the date the incident was reported, was my day off?

Q You were off August 4.

A The date the reason for his firing transpired, that happened the day I was off?

Q Were you on duty on August 5, the morning that he was fired.

A Ya.

Q When you came back to work August 5, what were you told?

A I was called in by Mr. Wurl and Mr. Victor and was told I had to terminate Mr. Pidal immediately?

Q Were you told the reason why you had to terminate Mr. Pidal immediately?

A For drinking on the job?

Q Were you told the facts what actually happened?

A They told me to the best of my memory, Mr. Gallinda had*

seen him drinking a beer and they wanted him terminated?

Q Did you do so?

A No?

Q Why did you not terminate him if he was your employee

under your supervision?

A For one thing, something personal existed between myself

and Mr. Victor?

Q Who is Mr. Victor?

A Mr. Victor ended up being my superior. I didn't think I

was going to do what he asked me to do.

Secondly, I didn't know what had happened, because it was the day before, because I, personally, did not want

A Mr. Lewis.

Q How was Mr. Lewis' job performance?

A*

Q And Mr. -- who was the other porter?

A Ron Bryant.

Q Okay.

Ron Bryant was there February, 1992, correct?

A Yes.

Q He was still is there in July, 1992?

Q Mr. Mas, Greg Wurl never indicated to you, did he, that he felt like he was obligated to hire Mr. Pidal back, did he?

A No, I can't say he ever did say he was obligated.

Q Would you agree with me that Greg Wurl had a big heart,

and he wanted to try to help out Mr. Pidal by providing him with an employment position at that time?

A Yes.

Q And Greg Wurl did not terminate either of the two porters, correct?

A Correct.

Q Greg Wurl wanted to be fair to John Lewis, correct?

A yes.

MR. MANZINI: Objection, Your Honor. This is the state of mind of somebody who has passed away, in any event.

Q Within those discussions, didn't there also contain discussions of another employee at Williamson, George Labrada?

A Yes, sir.

Q The two were discussed at the same time, correct?

A Because they were incidents that happened pretty much around the same time.

Q What was the incident with George Labrada?

A To the best of my memory --

MR. MANZINI: Objection. This has nothing to do with Mr. Pidal's case. There is -- we have not pled there is any pattern.

THE COURT: Some sidebar.

(Sidebar proceedings on the record.)

THE COURT: Mr. Manzini, there has been the interjections of other people on the direct examination. I am going to see where we are going on cross examination.

MR. QUINTON: Judge, what they have elicited in testimony on direct is that there was a concern for the costs of health care, and the reason for Mr. Pidal's being involved in those conversations was, Mr. Pidal had cost the company a lot of money.

What I want to do bring out is Mr. Labrada also cost the company a lot of money, So if by implication, they are saying Mr. Pidal was not fired for drinking beer, he was

THE COURT: There is no objection to it being received into evidence.

Defendant's A for identification is received as marked.

MR. QUINTON: Now Defendant's Exhibit 1.

MR. MANZINI: No objection to it coming in out of order.

BY MR. QUINTON:

Q Mr. Mas, I want to show you what was marked Defendant's Exhibit 1 and ask you if you have ever seen that document before?

A Yes.

Q Is there a memo from Greg Wurl to all managers at

Williamson Pontiac?

A Yes.

Q Is it dated December 30, 1991?

A Yes.

Q I would like you to look at paragraph 4.

Paragraph 4 states, "misuse of company vehicles or company license plates will be grounds for immediate termination."

Do you see that?

A Yes.

Q Was that rule in effect in August of 1992, to the best of your knowledge?

A Yes.

Q Mr. Mas, would drinking a beer in a company vehicle while performing a company duty be misuse of a company vehicle?

A Yes.

Q Mr. Mas, Mr. Manzini has told this jury that Mr. Pidal is suing Williamson Pontiac for discriminating against him based on disability.

Did Mr. Pidal ever say to you, "I have a disability"?

A No.

Q In fact, you thought he was better than ever when he came back to work in August?

A Actually, that's what the -- what the -- as I recall, the person I spoke to on the phone said that, too.

Q The person from the doctor's office?

A Yes.

Q Said he is better than ever?

A Yes.

Q Now, in addition to Mr. Pidal's disability claim, there has been some question about discriminating against Mr. Pidal based on his age.

Mr. Mas, was Mr. Pidal's age ever discussed in regard to his performance at Williamson Pontiac?

A No.

Q Let me show you --

MR. MANZINI: Thank you.

I'm sorry. No more questions.

THE COURT: All right, cross examination

CROSS EXAMINATION

BY MR. QUINTON:

Q Mr. Mas, you testified that Mr. Pidal was a porter.

Do porters, as part of their general duties, do porters drive the vehicles more than any other of the employees at a dealership.

A Well, the vehicles belong to the dealership.

Are you referring to the dealership vehicle?

Q Yes.

A Yes, it would be. That would be a "yes".

Q Mr. Mas, you have talked a lot of Mr. Pidal's heart problem on September 8, 1992.

After Mr. Pidal had his heart operation and he was

inquiring about coming back to work at Williamson, at that time Williamson Pontiac was not obligated to hire Mr. Pidal back, were they?

A No, they were not.

Q And, in fact, had Williamson already filled Mr. Pidal's

position that he vacated in February of 1992?

A Yes.

Q And who did they hire back in February, 1992?

Q You have already testified and told this jury you were involved in the initial hiring of Mr. Pidal, correct?

A Yes.

Q At the time you hired Mr. Pidal he was 58 years old, according to his application.

Did you read his application when he applied?

A I really don't size them up that way. I don't really read the applications.

A lot of times applications are -- you know, I don't rely too heavily on an application for employment of an individual.

Q At the time of the initial hiring of Mr. Pidal you stated you were involved with -- did you ever discuss with

anybody at Williamson Pontiac Mr. Pidal's age at the time he was applying for the position in 1991?

A It's very possible I may have mentioned the fact, but I don't really recall because I always like to run things by with Mr. Wurl.

Q You don't recall?

A I don't really recall.

Q Mr. Mas, you have testified to this jury that you felt that there were reasons, other than beer, for terminating Mr. Pidal, but there were no discussions at or about the time of rehiring Mr. Pidal where it was discussed that the dealership would bring him back and then, "see if we can get

him to quit or force him to quit or find some reason to let him go."

There were no discussions like that, were there?

MR. MANZINI: Your Honor, I object. The question has got several questions rolled into one. It's difficult for the witness to answer, I think.

THE COURT: All right, let's rephrase the question.

BY MR. QUINTON:

Q Mr. Mas, in regards to discussion at or about the time of rehiring Mr. Pidal in August -- you have testified regarding that occurrence -- am I correct there were no discussions in those managers' meetings about getting him to

quit?

A As far as I can remember, there were no discussions.

Q Am I correct there were no discussions in those managers' meetings about finding some reason to let him go?

A None that I can remember.

Q Mr. Mas, in regards to a porter's position, does a porter have to punch out when they go to lunch?

A That varies with dealerships.

At Williamson Pontiac, no, a porter did not. I think they wanted them to, but a lot of times, things were written in, hours were written in, et cetera.

Q At Williamson Pontiac, were porters supposed to punch out when they go to lunch?

the time that you asked Mr. Pidal to bring you a doctor's release that said he could get back to work, is it true that Mr. Wurl expected, and told you that, that the doctor would send a letter that said Mr. Pidal -- that it was not feasible for Mr. Pidal to get back to work?

MR. QUINTON: Judge, it is a compound questions, number one, and number two, he is asking what Mr. Wurl had expected.

THE COURT: Rephrase the question. Let's take out the "expected" and have him tell us what was said directly.

BY MR. MANZINI:

Q Did Mr. Wurl express to you at one of these managers'

meetings that you attended that he thought it would be difficult for Mr. Pidal to get a letter from his doctor saying he was ready to come back to work after his heard attack and open heart surgery?

A To the best of my memory, what I remember is him saying, "before we even consider letting him return, let's make sure that he can get a doctor's letter that he is going to be able to work out there. See if he can come up with that."

Q I realize it has been a year and a half since I took your sworn statement. I would like, again, to show you a page from it, if I may --

MR. MANZINI: Your Honor, I am reading from page 21

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starting at line 3, and for the rest of that page --

MR. QUINTON: Judge, can I state an objection?

Your Honor doesn't have a copy of the statement in front of him. You have already sustained one objection relating to the words stated. That's what he is getting into again.

THE COURT: Let me see the question. It starts at line 3.

All right, overruled.

You can ask if that refreshes his recollection about anything.

BY MR. MANZINI:

Q Does this refresh your recollection about what Mr. Wurl expected?

MR. QUINTON: Judge, I object, again. "Expected."

The question is, "what did Mr. Wurl say?" He is

asking for what Mr. Wurl expected.

Q Does this refresh your recollection as to --

THE COURT: What he said?

THE WITNESS: Yes.

Q Now, what did he say at the staff meeting that led to your asking Mr. Pidal for the doctor's release?

MR. QUINTON: This was asked and answered in the direct, what Mr. Wurl said.

THE COURT: Overruled.

A To make sure that he got a doctor's statement stating that he could return to work -- and what was the rest of your question?

Q Well, what was said at the staff meeting, what you thought was going to happen?

MR. QUINTON: Judge, I object to "what he thought was happening."

The question should be "what was said."

MR. MANZINI: May I read the question and answer?

THE COURT: No, sir.

This is to refresh his recollection about what Mr. Wurl said.

BY MR. MANZINI:

Q Would you read, again, page 21, line 3 through the end,

please?

A (Complied.)

MR. QUINTON: Judge, I would ask Mr. Manzini to

step back. I can't hear what he is saying.

MR. MANZINI: I'm sorry.

While I am showing him the written statement...

Q Okay, go ahead.

MR. QUINTON: I don't think there is a pending

question.

THE COURT: Have a seat, counsel.

Ask your question.

THE WITNESS: The way he asked for the letter or wanted the letter. The way the meeting was going, "What are we going to do about bringing back Mr. Pidal?" and it sort of happened like an idea, like a light bulb turned on. "Hey, let's get a letter from his doctor making sure he can come back to work, and if he can get that, okay, and if not, that would be the need of it right there."

BY MR. MANZINI:

Q Is it a fair statement that Wurl and the rest of you were surprised when --

THE COURT: Sustained.

That was asked and answered.

BY MR. MANZINI:

Q Was Mr. Wurl surprised --

BEST AVAI

THE COURT: Sustained.

Did Mr. Wurl tell you that he was surprised, "yes" or "no"?

THE WITNESS: No.

THE COURT: Next question.

Q Did he express surprise in any other way?

THE COURT: Did you observe him express surprise?

THE WITNESS: I don't remember.

THE COURT: Next question.

BY MR. MANZINI:

Q I would like you to look at Defendant's Exhibit 1, the

LABLE COPY

day, give or take?

A Yeah, I kept working the same.

Q What happened on February 8, 1992?

A Due to the fact that a couple of fellow workers did not show up for work, I had to do the cleaning work all by myself, and so I felt the pressure in my chest around noon, and I was sweating, cold, and even though I was feeling that way, I completed the cleaning of the car outside. I couldn't take it anymore and so I had to get back to the office, and I had them call Rescue for me so they would take me to the hospital.

Q What hospital did they take you to?

A The new South Miami Hospital in Homestead.

Q Okay, and what did they do there?

A First of all, they put me inside the Rescue car. They

took my blood pressure, it was high. Then they gave me some pills and some spray for my heart.

When I got to the hospital, they ran an EKG on me and they saw that I had had an infarction.

Q An infarction, meaning, a heart attack?

A Yes, a heart attack.

Q What happened next?

A I was in the hospital, in intensive care for 5 days.

Q Then where did you go?

A After that, I went home and I was convalescing at home.

quadruple heart bypass?

A (In English) 4 bypass, (In Spanish) and I had 350 stitches in my body.

Q Running up and down your legs?

A Both legs completely, and my chest.

Q And what happened after your quadruple open-heart surgery?

A I was convalescing for 90 days.

Q You have got to let her -- Mr. Pidal?

A Excuse me?

Q Let her translate.

MR. HUDSON: If I may, Your Honor, just make a request that when the interpreter is talking to Mr. Pidal, as she just did, in summary fashion, that she does it in English.

MR. MANZINI: She translated my comment.

MR. HUDSON: She made another comment.

THE INTERPRETER: I translated exactly what the attorney said.

THE COURT: Proceed.

BY MR. MANZINI:

Q After your surgery, how long was your convalescence?

A 90 days was my convalescence.

Q Your surgery was in March, was it not?

A March 3.

A Well, the truth is, I don't understand anything about that.

Q Let me show you a document that's marked Plaintiff's Exhibit 4 and ask you if you have ever seen this document before or a copy of it

A No, because I was still convalescing due to my operation. I was even thrown out of two houses for lack of payment.

Q Okay, we will get to that.

Why don't we concentrate on this question, which was, did Mr. Wurl or anyone at Williamson ever advise you that your official status with the company was that you were on a temporary leave of absence as opposed to having been fired?

MR. HUDSON: Objection. Hearsay.

THE COURT: It's leading, also.

Sustained.

MR. MANZINI: We will withdraw the question.

BY MR. MANZINI:

Q What happened when you went back to Williamson?

A Well, I started doing the assignments that I was conducting before.

Q On August 3, 1992, what did you do, August 3, 1992, specifically?

A Well, I was cleaning cars --

Q What time did you report for work?

A -- cleaning the engines of the cars -- at 9:00 in the morning.

Q Is that the usual time that you arrived on the job?

A Yes, sir.

Q How long a shift did you work that day?

A I worked as late as 7:00 that night.

Q Did you have a lunch or dinner break during that 10-hour period?

A No, I didn't concern myself with taking lunch breaks, in order to do my job more quickly.

Q That was August 3.

August 4 was your second day back at work. What did you do on that day?

A On the 4, Jorge Mas was off, so he left me in charge of inspecting the cars.

Q What do you mean by "inspecting the cars"?

A The inspection is so as to see if the car would pass it so as to be able to sell it.

Q This is the emissions inspection?

A (In English) Yes.

Q On the day how many cars did you take down to the emissions inspection?

A They were up to number 9. Sometimes, it takes an hour, between one thing and the other, to get the cars inspected.

Q So, your knowledge about how much money you owe for your medical expenses comes from someone else telling you that?

A Exactly, because my daughter is a doctor. She is no stupid person. (In English) I'm sorry for the -- for the words.

Q That's fine.

A (In English) Thank you.

Q Just briefly, after you had been released from the Homestead hospital April 12 or 13 of 1992, you did not go back to work until August 3, isn't that right?

A Exactly.

Q And that period of time -- I just want to get this clear -- that period of time between your release from Homestead and the day you readmitted yourself to Baptist Hospital, you didn't work during that period?

A Until the operation.

Q You didn't work until August 3, actually?

A Until I started working at Williamson Cadillac for the second time.

Q You would agree, Mr. Pidal, it was certainly reasonable for the company to ask for a doctor's release after you told them you were ready to come back to work?

A Surely, due to the circumstances.

Q That's right. Absolutely. Thank you.

As a matter of fact, during your recovery, Mr.

Q So, the job was even easier?

A Before I had been hired to wash cars. Then, after that,

I did too many things that I was not supposed to do for the company.

Q But you were rehired at the same job that you left in February.

A Yes.

Q They didn't increase your duties?

A But I kept doing the same job.

Q And they didn't increase your hours?

A Of course, I had a contract, and I was doing extra hours, giving --

Q Do you have a copy of that contract here today?

A No, it was verbal. It was verbal between the owner and

myself, and the manager and myself.

Q And you were released to return to work without any restrictions?

A Exactly.

Q You didn't ask for any help in performing your job when you returned to work on August 3?

A No.

Two days later, they were going to do to me what they had done before. They were going to get me out, with an excuse.

Q But the question was whether or not you asked for any

help in performing your job when you returned in August?

A No, nobody.

Q You worked there, then, for two days, right?

A Exactly, doing things that others were not doing because they were not supposed to was the engines, and yet I went out into the street, and I washed the engines.

Q In the street?

A No.

I went and took the cars to my house to clean the engines there.

Q That's right --

A With the permission of the owner.

Q As a matter of fact, you drove a lot of cars on public roadways those two days?

A Exactly.

Q You were on the road constantly, as a matter of fact?

A Exactly.

Q And I think you testified yesterday, on your direct examination, that you took nine cars on your last full day of work to the state inspection center?

A It was the cars.

Q On one of those trips, you stopped to get a meal, to get a bite to eat?

A No, it was not like that.

Q When you stopped to get a bite to eat on the -- well,

When did you first see Mr. Pidal the plaintiff in this lawsuit?

A On February 16, 1992.

Q Why did he come to see you?

A He came to the emergency room and I saw him in the emergency room with chest pain.

Q Okay.

Did you subsequently diagnose his problems?

A His problem was that I felt that he had significant coronary artery disease and needed a cardiac catheterization. He was subsequently transferred, for insurance reasons from Baptist Hospital to Mount Sinai Hospital.

Q Did you suggest to him that he should have open heart surgery or that he was a candidate for open heart surgery?

A No, I wasn't in a position. I didn't have the

information from the cardiac catheterization that's needed to make that--

Q Do you understand him to have subsequently undergone quadruple heart bypass?

A Yes.

Q When do your notes reflect when that happen?

A I don't know specifically. He was transferred -- it's on February 18, to Mount Sinai Hospital and subsequently underwent cardio catheterization and bypass surgery shortly

thereafter in Mt. Sinai Hospital.

Q Do you know what causes heart attack?

A Do I know what causes heart attack?

Q What caused his particular heart attack?

A What probably causes most people's heart attacks; coronary atherosclerosis, coronary artery disease.

Q Was he suffering from heart disease when you first saw him?

A My presumption was, he was, because of his abnormal electrocardiogram.

Q Did you see him after his quadruple heart bypass surgery?

A My next contact -- he came to the emergency room on February 30, 1992, with chest pain.

Q February?

A Excuse me, not February, May 30.

Q Okay.

A 1992.

Q Did you examine him on that occasion?

A Yes, I did.

Q What was the result of your observations?

A He was having chest pain, and the way he described it,

and as I noted there, he was having check pain that I thought was probably not his heart, probably musculoskeletal in nature, and we were to define it with an examiner's test.

Q Is that what happened?

A Yes.

He was seen an discharged, and then the day after discharge underwent an examiner's thallium at Baptist Hospital.

Q That showed his heart was okay?

A That showed he really did excellent on that.

Q This was approximately three months after you understand him to have undergone his quadruple heart bypass surgery?

A Approximately, yes.

Q The last time you saw him was, when?

A Was on the date of the examiners test, which was --

Q Early June?

A June 5, 1992.

Q As of June 5, 1992, did you feel that Dr., -- you are the doctor -- Mr Pidal had fully recovered from his heart

illness?

A I guess when I saw him on June 5, he did excellent on the examiner's test, and I felt that he was in good cardiovascular condition at that time.

Q Thank you.

Q Did you encourage Mr. Pidal after that las visit on June 5 1992 to return to work?

A Did I encourage him?

Q Yes, sir?

A I guess I gave no reason he should not go back to work because of his heart. When I had seen him in the hospital, when he was admitted on May 30, one of his questions to me was, "could I go back to work?" and that's one of the reasons we performed the examiner's test, to see how he did, and again, he did quite well, and I gave him the okay. cardiac-wise, there would be no reason not to go back to work.

Q Dr. Roberts, do you have your discharge summary of Mr. Pidal before you?

A Is this the one from May 30 to June.

Q Yes?

A Yes.

Q If you would, flip the pages to page 3.

A (Complied.) Okay.

Q The paragraph labeled "assessment"?

A Yes.

Q Would you read to the jury what you wrote there?

A "Assessment, chest pain, probably musculoskeletal, with resolution, with Naprosyn."

I was a bit concerned that it may have been -- there is a blank here, the typist left something out -- "and will obtain an outpatient exercise thallium. If this is normal, I am going to encourage the patient to return to work.

"He, apparently, was told he was disable for a year after his bypass, which is clearly not the case.

"He wants to return to work so he can provide for his family. I think he need to reassure him.

"We'll see him in the office in several weeks and help arrange matters."

Q In fact the exercise thallium, that you recommended, it proved, I guess, negative?

A It proved -- right.

Both portions -- the electrocardiographic portion, we watched, the cardiogram was normal, when he exercised, and the thallium, which looks at the profusion, was also normal. It was a normal test.

Q There was no cardiac reason for him not to be able to return to work or otherwise resume his normal activities?

A No.

With the level he exercised, and it's being normal, I felt that he could return to work. There was no reason, from a cardiac point of view, not to return to work.

Q I would like to show you a copy of what I believe you have before you and ask you if these are your notes, including the discharge summary you just referred to?

A Yes this is it.

Q Is this what comprises your file on Mr. Pidal?

A Yes this is the identical file that I have.

A Chest pain.

Q Anything specifically concerning that chest pain?

A Specifically?

Q Did he give you a reason why his chest was hurting.

A I can read from the admission note.

Q Do you need that to refresh your memory?

A Yes, I would. It is a case from more than two years ago.

THE COURT: Take a look at your notes and then put your notes down and see if you are refreshed.

BY MR. HUDSON:

Q Read it to yourself.

A Okay.

Q The history of present illness?

A I have it.

Q Could you tell the jury the reason why Mr. Pidal went to the hospital on February 16, 1992?

A Because he was having chest pain.

Q Did he give you any reason for that chest pain?

A He stated it began when he was having an argument.

Q Did he tell you who he was who he was having the argument with?

A With his son.

Q Did Mr. Pidal, at any time, indicate to you, that he had worked at Williamson Pontiac February 8 through the 16?

A Now it's Deering Hospital.

Q Do you know if there was any EKGs or any other test done at the Coral Reef Hospital concerning Mr. Pidal's heart?

A I noted that he had EKGs and an ekocardiogram done at that hospital.

Q What was the result of that?

A I don't know the exact results of that, other than his physician there told him at that time -- this is what Mr. Pidal told me that he needed a cardiac catheterization.

Q Okay.

Do your notes reflect the results of that EKG at Coral Reef Hospital.

A Yes; that the cardiogram that was taken on February 16 in the Baptist emergency room I noted EKG changes from

Baptist, are unchanged from an EKG faxed on the date 2/11/92 from Coral Reef

Q Doctor, at Coral Reef Hospital, there were tests that Mr. Pidal underwent at that location at that hospital. Did they indicate whether or not he had a myocardial infarction?

A I don't know, and I don't have that data, and so I can't tell you whether -- let me just read this to make certain -- no, it says myocardial infarction was ruled out, where a heart attack was ruled out. This is from the patient telling me he was admitted, and they told him he did not have a heart attack, but he needed a catheterization.

Your Honor?

THE COURT: No.

BY MR. HUDSON.

Q Mr. Pidal, you began work at Tamiami Chrysler -- is that the name of the company, Tamiami Chrysler -- after you left Williamson Pontiac

A No.

Q You did not?

A Yes, I went there, but not immediately.

Q When did you start working at Tamiami Chrysler?

A How can I remember?

Q It was the same month that you were discharged from Williamson Pontiac, isn't that true?

A Surely, almost.

MR. HUDSON: It's Williamson Pontiac.

THE INTERPRETER: Excuse me.

Q And you quit that job six weeks later?

A Exactly.

Q Isn't it true, Mr. Pidal, that if you had stayed employed in that position, you would have been eligible for health insurance benefits after 90 days?

A I don't know, because I did not work the 90 days, and around that time they also changed the insurance. That's what I understand.

Q When you took the job at Tamiami, did you inquire about

health insurance benefits?

A No, I did not ask. I never asked.

Q They had --

A They tell me, I start working, and I am not going to start asking things.

Q You had no health insurance coverage when you applied for that job?

A No.

Q And you did not ask, at any time you were employed there, whether or not they had health insurance coverage?

A I heard it being said that they had insurance coverage for the company, but I did not know for sure until they gave me something to sign, and I knew that it would be only after 90 days that they would take off from my salary for the insurance.

Q A minute ago you didn't know, but now you do, as far as being able to be eligible for health insurance benefits after 90 days?

MR. MANZINI: Objection. Argumentative

THE COURT: Overruled.

A Upon 90 days.

All companies have insurance, most companies do have insurance, and it doesn't go into effect until after 90 days. Why should I ask? That would already come in time.

Q And you walked off that job knowing that?

differently.

THE COURT: Overruled.

A Do you think that one can support a household and have a car, earning $5 an hour for a 50-hour week with all the withholdings on top of it?

Q Mr. Pidal do you know a Mr. Mario Fernandez?

A Surely.

Q He was your supervisor at Tamiami Chrysler, isn't that true?

A Surely.

Q And you told Mr. Fernandez about your heart surgery at Williamson, didn't you?

THE INTERPRETER: What is the name of the gentleman? I'm sorry.

MR. HUDSON: Fernandez

A (In English) Yes.

Q And he told you did not have to lift anything heavy if you didn't want to?

A But that was to the contrary, because I was carrying heavy pieces.

In spite of the fact that he told you didn't have to do it?

A Exactly.

Q Exactly.

A There is something very important. (In English) Just a

minute.

In order to lift the parts, one had to lift them up with a lift.

Q But he told you if you had to lift anything heavy, you didn't have to do it?

A And who was going to do it. Then I would have to leave.

Q He told you other employees would do it as long as you notified him, didn't you?

A Oh, yes, so then, they would remove me from the work.

Q He didn't tell you that?

A Well, you will see, he would have done it.

Q Mr. Pidal --

A He would have done it if I hadn't done the job.

BEST AVAILAB

Q Mr. Pidal, your doctor, Bringaze, has never added any restrictions to your work release at all, has he?

A Well, it depends.

If I am going to be carrying, lifting, parts that weight 100 pounds, having been operated on my heart, I don't think that's correct.

Q But the question is whether or not your doctor added any restrictions to your work release at any time after he released you from work in July of 1992.

Did he?

A He didn't add any. He didn't tell me that I would have to do a particular type of work until I would burst.

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Q Now, the heat that you are talking about on the second floor at Tamiami Chrysler, what is the problem with that? Was it too hot for you to work up there?

A Too much. It was too hot.

A Supposedly, if you have been operated on your heart, you are not supposed to be under the hot sun or be subjected to such conditions were there is a lot of heat.

Q You weren't under the hot sun when you were on the second floor of the building at Tamiami Dodge, were you?

A Yes, but the temperature there was always higher than 90 degrees, because nobody wanted to work in that floor over there.

Q How hot was it in August of 1992, when you were working

as a porter at Williamson Pontiac outside?

A Well, but I would get into a car, I would get into air-conditioning, and then, when I would move a car, I would put it under the shade.

Q Isn't it true, Mr. Pidal, Mr. Fernandez at Tamiami told you if it gets too hot, take a break, go get something to drink, and relax?

A (In English) Yes.

Then every so often, I would have to be taking breaks, and breaks, and breaks.

Do you remember filling out an employment application at Tamiami Dodge?

Q Are you too ill to work, Mr. Pidal?

MR. MANZINI: Objection. Asked and answered.

THE COURT: Sustained.

Let's move on, counsel.

MR. MANZINI: Thank you, Judge.

BY MR. HUDSON.

Q Mr. Pidal, do you remember signing a statement with the EEOC?

MR. HUDSON: I believe it has been admitted into evidence already.

Q I have a copy of it here I would like to show you.

MR. HUDSON: Your Honor, may I approach?

THE COURT: Is this received in evidence?

MR. HUDSON: What number was it?

MR. MANZINI: 6.

MR. QUINTON: Here is the actual exhibit, if you

ant to use that. I have a copy here, and I have highlighted some sections for your attention.

BY MR. HUDSON

Q Mr. Pidal, did I understand you well the other day, when you testified that the person who typed this statement at the EEOC made a mistake?

A Well, he didn't understand me and I didn't understand what he put down here.

It was a woman, though, wasn't it?

You did not tell Ms. Bauer that you drank a cerveza?

A No.

I said -- I said that they were accusing me of having drunk a beer.

Q She said that statement?

A If she wrote that down, that was her mistake.

Q She made that same mistake twice -- isn't that correct -- on the first page and again on the second page?

A If I had known how to read this, I wouldn't have signed it.

Q Is it your testimony she made a mistake twice with respect to your statement?

A Yes, it was her error.

THE COURT: Let's take a 10-minute break, ladies and gentlemen.

(Jury out.)

THE COURT: Counsel, how much longer do you expect this cross is going to take?

MR. HUDSON: 10 minutes.

THE COURT: We will be in recess for about 10 minutes.

(Recess taken.)

THE COURT: Counsel, how long do you expect the redirect will be?

day not later than 2:00 p.m. I have given this some thought and rather than taking a lunch break at 12:00 and having you come back for an hour, we are going to proceed with trial through 1:00 and excuse you at 1:00. We won't take a lunch break, we will take two 10 or 15 minutes breaks.

Call your next witness.

MR. MANZINI: We would call Mr. Ed Williamson.

GEORGE EDMUND WILLIAMSON, II, PLAINTIFF'S WITNESS, SWORN.

MR. MANZINI: Good morning, ladies and gentlemen.

May it please the Court, Mr. Hudson, Mr. Quintero.

BY MR. MANZINI:

Q Good morning, Mr. Williamson.

Would you please state your full name.

A George Edmund Williamson, II.

Q Are you the owner of Williamson Cadillac?

A I am one of the two owners of Williamson Cadillac.

Q Who is the other?

A. My brother.

Q Do you presently own both dealerships, the one in Dadeland and the one in Homestead?

A My brother and I are also partners in Homestead.

Q Mr. Wurl, who was a previous owner is now deceased, is that correct?

A Yes.

Q Subsequent to his death, one of you or both you and your

there. If the defendant's case is going forward, we will call him as our first witness.

THE COURT: Very well.

GEORGE EDMUND WILLIAMSON, II, DEFENDANT'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. QUINTON:

Q Mr. Williamson, you have already advised the jury what your name is. I don't want ask you that again.

Are you presently employed?

A Yes.

Q With whom?

A I am an employee of Williamson Cadillac Company, 7250 North Kendall Drive, and Williamson Saturn, Incorporated, 7280 North Kendall Drive.

Q Do you hold any positions with Williamson Pontiac in Homestead?

A Yes, I am the president of the company.

Q Okay.

You are also the chief executive officer?

A Yes.

Q In fact, you are the chief executive officer of all three dealerships?

A Yes.

Q As the chief executive officer, generally, tell this jury what your duties are?

When George Mas left Homestead, he came up to see that manage to get a job selling used cars.

The manager came to me and said, "could we hire him?"

I said, "why do you want to do that?"

He said, "I know they weren't doing a very good good job-management-wise. I think he can sell cars."

So, they put him on selling cars. I think he was there about two months and left of his own accord.

Q Would you have hired George Mas as a manager at Williamson Cadillac?

A No.

Q Mr. Williamson, I want to show you what has previously been marked Plaintiff's Exhibit 3. It's a letter from Williamson Pontiac to Mr. Pidal, and it identifies placing Mr. Pidal on COBRA conversion?

A Yes.

Q I want to ask you to take a look at that letter.

A (Complied.) Okay.

Q In relation to the policy at Williamson Pontiac, Mr. Pidal had his heart problem February 8, 1992. For the jury's information, this is dated March 19, 1992. The letter states that as of April 1 they are going to offer him COBRA coverage, so he has been going about a month and about three weeks, a month plus three weeks.

Does Williamson Pontiac have a policy when employees leave for medical reasons?

A Yes.

The policy for all three dealerships is the same, and that is, if somebody leaves for medical reasons, for the first 30 days we keep them on the medical plan. Starting the second month, we make them the COBRA -- we make the COBRA offer which is -- you know, this is a Federally-mandated thing, COBRA is.

If they come back within the first 60 days, we either give them their exact same job back, if we still have it, or match it as closely as possible.

After 60 days we consider them no longer an employee.

However, if after some extended period of time they

are able to come back to work and come and apply for a job with us, we give them more of an opportunity to get the job than somebody else, for several reasons.

First of all, they already understand us, and we

understand them. We don't have to take them back. If it was somebody that we really didn't think we had a spot for, we wouldn't hire them back. If it was somebody we thought would be good for the company and vice-versa, we give them

every opportunity.

Q Let me ask you a few questions about the COBRA coverage.

The letter, Exhibit 3, advises, that:

"As of April 1, 1992, your Advent Insurance with Williamson Pontiac will be cancelled."

It states:

"You are eligible for COBRA insurance through administrative services."

Mr. Pidal was eligible for COBRA. What is COBRA?

A C-O-B-R-A is an acronym for a Federal law and I don't remember all the words, but it's Comprehensive On Benefit-something Act that says that if you have an -- to a company -- if you have an employee who is on a health care plan and they leave your employment for any reason, whether

it's the company's idea, or the employee's idea, or for medical reasons, whatever, they don't necessarily get dropped and be without insurance. They are able to then pay all of the premium themselves.

I think the Federal law mandates there is at 10 per cent surcharge on that an the ex-employee, at that point, makes payment on a monthly basis to whoever the health plan is and retains the same benefits they had before.

They can do that for up to six months.

Q So, Exhibit 3 that offers Mr. Pidal the COBRA coverage.

Mr. Pidal has testified he accepted it and paid it for three months.

When Mr. Pidal's is on Williams COBRA coverage, is

would be on our same plan.

Q Based upon your experience with Williamson dealerships and your involvement in the health care coverage of Williamson, would the COBRA premium be lower than if Mr. Pidal went out into the public to find a health plan?

A Absolutely.

Q And the COBRA was offered to Mr. Pidal?

A yes, and he took it for 90 days.

Q It's your understanding Mr. Pidal could have remained on COBRA for 33 months?

A Sir, he could have remained on COBRA until February the

8 of 1995.

Q Is there any way the Williamson dealerships can cut somebody off of COBRA?

A. No.

Q If Mr. Pidal continued to pay his premium he would still be on COBRA?

A Correct.

Q In fact, he would still be part of your Williamson health care plan?

A That's right. Even if we change plans, he would move to the next plan with us.

A As a COBRA participant?

A Correct.

Q Mr. Williamson, as part of the policy of the Williamson

dealerships, when an employee leaves for medical reasons, did you hold their position open for them?

A No, but like I said before, if they come back within 60 days we will rehire them and try to match the position he had before as closely as possible.

Q Now, in regard to the Williamson Pontiac medical plan, did you work with Greg Wurl on that?

A Yes, I designed -- this is a company-wide plan. It covers all the employees and the families of all three dealerships. It's something I put together in the spring of '91.

Q Now, health care plans are -- let me ask you to explain to the jury, as best you can, how Williamson's health care

plan worked.

Let me first ask you the question, did the health care plan cover Williamson Pontiac, Williamson Cadillac, and Saturn of Dadeland?

A Yes.

Q It had all those employees involved, correct?

A Yes.

Q Would you explain to the jury, the best you can, how the Williamson health care plan works?

Let me preface that, and get a time frame so the jury can understand.

Mr. Pidal has alleged, in this case, that in August

A Yes.

Q And you and Greg Wurl sat down and determined, of that figure, what the company would contribute?

A Correct.

Q Using your estimates it was about 110, so that would mean the employees would contribute 30?

A Right.

Q Now, let me ask you, in terms of the 110 that the company paid, is that set by the company?

A Yes.

Q Now, it has been alleged in this case that because Mr. Pidal had a serious health problem, in fact, in 1992, he had open heart surgery, that that had a significant impact on the dealership's health care plan and because of that, Greg Wurl terminated Mr. Pidal.

Let me ask you, in this plan, is there any provision for someone having a catastrophic or a large health care claim?

A Yes.

What happens is, all the money goes into a reserve account. This is just mainly a bookkeeping thing. All of the company contributions and all of the employee contributions, including if they decide to buy the coverage

for their family, as well, that goes into one pot. There are certain things paid out of the pot.

Besides just the hospital and doctors, we pay ASI, I think, 5 or 6 bucks a month, per person, to do the administration. We pay a couple of other small administrative fees. We pay, after medical, so much a month per person besides the actual things the doctors get, and then we buy -- out of that, we buy two kinds of insurance to protect the plan. They are called stop-loss policies.

We buy a specific stop-loss and aggregate stop-loss, and the specific stop-loss in place in '91, '92, was $45,000.

What that meant was, if a particular participant in

the plan had a health or injury problem that had claims for over $45,000, then the specific stop-loss paid all the expenses after the $45,000.

I think in this particular case it never got to stop-loss. I think the total here was about $33,000.

The aggregate stop-loss is in case we had a lot of people, a lot of employees and their family members have really big expenses in a particular year, we want to make sure the plan was limited in its exposure.

We took all the employees and all the family units and multiplied them by all the premium equivalent time, 12 months, and some other costs, we came up with about $60,000

That was the cap we wanted the plan to be exposed for, and we bought aggregate stop-loss coverage for that number.

So, that means, if we had 20 people that all hit the $45,000 cap, even though that by-itself-total is $900,000, the plans exposure was only the 560, for example.

We bought that because you just don't know what could happen. You could have some kind of an epidemic that could come in and cause a locality of people to have some expensive problems.

Q Just so I am clear, you mentioned that word "reserve pool"?

A right.

The reserve is all the money that goes in, less

whatever comes out. If you have money left over, you have a reserve.

Q The reserve would be the accumulation of this $130?

A 140, plus the family premium equivalent as well.

Q That goes in and it's a reserve.

If the health care claims go excessive, as you said, that's when you have the stop-loss which would protect you in case --

A Protects the plan.

Q So, if it got to that point, it would not cause the employees or the dealership money?

A Correct.

the '09/'91 year, too.

Q Greg Wurl was aware of this?

A Yes.

Q In August --

A He saw the numbers about every 90 days.

Q In August of 1992, Greg Wurl was aware in the prior two years you had money left over in the reserve?

A Yes.

Q In terms of what it cost the dealership, just the dealership, now, is what it cost the dealership set by you and Mr. Wurl in regard to Williamson Pontiac?

A yes.

Q Now, if claims phone gone up would that make you pay more into the health care plan, "you", meaning Williamson Pontiac?

A The company, the company's participation is set by us.

So, if you had a year where the loss ratio was exceedingly high, and because of that some of our -- the administer would decide the premium equivalent would need to go up, that would raise the employee's position, as long as we didn't change whatever the company's position was.

Q That was totally up to your discretion to change the company's participation?

A Yes.

Q Is it correct you could have actually said you are not

Q Let's put this into perspective, Mr. Williamson. For Williamson Pontiac in 1992, what was, in terms of percentage, of overall dealership expenses --

A Right.

Q -- overall dealership expenses for Williamson Pontiac in 1992, what was, what percentage was Williamson Pontiac employee benefit expense?

MR. MANZINI: Objection, Judge. This isn't relevant to this case.

THE COURT: Overruled.

A The company's portion of the health care plan was about 3 per cent of our total expenses. There are other employee benefit costs, uniforms and lots of things.

Q Are you familiar with the total amount of claims mr. Pidal made in regard to the Williamson plan in 1992?

A Yes.

Q How much was that?

A $33,000-and -change.

Q There has been mention of the name George Labrada who was a Williamson Pontiac employee.

Are you aware of how much his claims were in 1992?

MR. MANZINI: Objection, Judge, until it can be established this other employee has anything to do with this case based on your prior ruling.

THE COURT: Come sidebar.

THE COURT: Who are the other people?

MR. QUINTON: The other people are in the same situation; people in the protected age group, number one; people who had health problems and sustained substantial claims against their plan, number two. They have all been brought back to be employed. Some, in fact, had heart problems, one had a cancer problems.

THE COURT: How many are we talking about?

MR. QUINTON: I think 3 or 4 or 5.

THE COURT: How long is this going to take?

MR. QUINTON: The example testimony might take 10 minutes.

MR. MANZINI: I thought your prior ruling was,

unless they were the same age group.

THE COURT : That's what he just said. He said they

are.

MR. QUINTON: The protected age group.

THE COURT: The protected class.

MR. MANZINI: Okay.

(Sidebar proceedings concluded.)

BY MR. QUINTON:

Q Mr. Williamson, based upon your overseeing the health

plan are you familiar with the total aggregate claims of George Labrada in 1992 against the health care plan?

A Yes.

Q How much is that?

A About $45,000.

Q Mr. Williamson, have there been -- and again, I would like to focus to the relevant time, 1992 -- other examples of other employees at Williamson who have sustained major medical problems made claims against the company an subsequently remained employed or reemployed at Williamson?

A Yes.

I can give you a few examples.

Q Would you give me an example of a few?

A We have a new-car salesman at the Cadillac dealership, Mr. Silvestri, who, 10 years ago, had some heart problems. They reoccurred during the '91/'92 year --

MR. MANZINI: Unless Mr. Silvestri's age can be established, at this juncture --

THE WITNESS: He was born 6/30/29.

MR. MANZINI: This happened 10 years --

MR. QUINTON: He hasn't finished.

THE COURT: Overruled.

A About two and a half years ago, he had a reoccurrence of this.

During the '91/'92 health plan year, he had two angioplasties. That's where they stick the wire in your heart and blow up the balloon.

He came back to work and he is still there now. He

will be 65 next month -- this month.

Q Now --

A He hit the cap. He was over $45,000. I don't know what the total number was.

Q He is presently employed by Williamson?

A Yes.

Q Any other examples?

A We had another salesman, a man named Carl Adams, born 7/16/32, who discovered that he had cancer about the first quarter of '91, and fought it for two years. He stayed, technically stayed employed with us the whole time. He would have some treatment or surgery, and go in and come back, and he stayed there for the two years

until he died January of '93. He not only hit the capt expense-wise, but I think his total expenses were a little less than $200,000, over 150.

We have a --

Q Let me ask you, in regard to Mr. Adams, you said he worked for a little while, would go get treatment, and come back?

A Yes.

Q Was he able to maintain his regular hours as a salesman?

A No, not at all.

He, you know, our salesmen are arranged in teams. Whatever shift he was on, sometimes he was there, and then

for weeks, while he was either getting kemo or radiation or having some surgery, he wasn't. The other guys would cover for him.

Q Did you ever tell him if he doesn't maintain his hours he is terminated?

A No.

Q Any other examples besides Mr. Adams and Mr. Silveri?

A We had a service adviser named Bill Beauregard, also, at the Cadillac store.

Mr. Beauregard was born 3/6/31. He was just 64.

He had a heart attack during the '91/'92 plan year.

He had open heart, incurring -- his expenses were similar to this particular case, in the middle 30s. His recovery has not been very good.

He elected COBRA and he is still on it, and he also comes back and does some other things for us from time to time.

He is able to drive. He does -- if we do a dealer trade with a dealer in West Palm, he will drive a car for pay.

Q Mr. Beauregard is on your plan in COBRA status?

A Correct.

Q Anybody else?

A We had another salesman, a man named Mario Alvarez, born 2/10/35, who contracted a strange malady, also, a couple of

years ago. He was ultimately out for months, but every two weeks it looked like he was coming back for two weeks.

The doctor had a very difficult time finding it.

It was some kind of a glandular problem. His expenses were also in the middle 30s. He has finally come back.

Q Mr. Alvarez is presently employed by Williamson?

A Yes.

Q It's your testimony Mr. Alvarez would be, how old?

A 59.

Q I believe it is your testimony that Williamson Pontiac has less than 100 employees?

A Yes.

Q In 1992, didn't they have less than 100 employees?

A Yes.

MR. QUINTON: May I take a moment, Judge?

BY MR. QUINTON:

Q Mr. Williamson, just so the jury is clear, you stated Mr. Pidal had $33,000 in claims in 1992 that were paid, correct?

A Yes.

Q Mr. Williamson, in your position as the chief executive officer of Williamson Pontiac, you have access to, or custody of the business documents of Williamson Pontiac?

A Yes.

MR. MANZINI: No objection.

Q He wasn't taken off the insurance coverage. He didn't have to dig into his own pocket, where there was no money, to pay for the COBRA insurance.

That's where the similarities end?

A Yes, make sure the only difference in costs if $110 a month.

Q I understand that.

We have had testimony here that it wa $387 a month to go on COBRA for Mr. Pidal who had a family, a wife, and kids.

A Yes, but when he was still working for us, he was paying for his family coverage as well.

Q I understand you were withholding some amount of money from his weekly paychecks. Once he stopped working for you because he got sick and you put him on COBRA, he was supposed to pay for the whole freight?

A Yes.

Q In his particular case, it was 4387 a month for his family coverage which he had all along, correct?

A Yes.

Q Let's turn to Mr. Adams.

He had cancer, and I am sure you care for him, and he died in 1993.

Mr. Adams was also not somebody that was put on medical leave of absence because he didn't leave work --

A Correct, he didn't leave work.

Q -- for six months, like Mr. Pidal had to be because of a heart condition that prevented him from work.

He had cancer, and people with cancer sometimes can resume their daily lives, correct? He continued on as he had before, until he passed away, yes?

A Yes.

Q That's where the similarities end there, as well, correct?

A The similarity is, we didn't try to terminate any of those people because we thought we were going to have higher health care claims in the future.

Q We are going to get to that in a moment.

Let's talk about Mr. Beauregard. You said he had heart problems, open heart surgery?

A He had a bypass.

Q Mr. Beauregard went on COBRA insurance. Apparently, he can afford to pay for it because he stayed on COBRA insurance --

MR. QUINTON: Your Honor, objection.

There are two questions pending.

THE COURT: Sustained.

BY MR. MANZINI:

Q Mr. Beauregard, he had heart problems and had open heart surgery, apparently, like Mr. Pidal?

A Yes.

Q The only difference here is, he never went back to work permanently because he is still on COBRA, correct?

A Correct.

Q Unlike Mr. Pidal, who came back to work six months later, Mr. Beauregard stayed away. You said he might come once in a while, but he is not a permanent employee of the company anymore?

A Correct. His recovery -- he has not been as fortunate as Mr. Pidal.

Q That's where the similarities end there, as well. Mr. Beaureregard stayed away. He never came back to

work. He is on COBRA. He is fortunate enough to be able to afford it, Mr. Pidal wasn't?

A Okay.

Q Now, lastly, let's talk about Mr. Alvarez.

He is still employed by Williamson, correct?

A Yes.

Q All right.

He didn't take off for a long time?

A Well, he was gone, more or less, for six months.

Q All right.

A But this was not a situation where he is sick, he is not coming back for six months. His situation was significantly different.

day, his claims would have been higher?

A I have no idea.

Q We have testimony in this trial that he has $30,000 worth of unpaid medical claims.

A I have no idea, sir.

Q If you hadn't taken him off the insurance 30 days after he got sick, he would have reached that stop-loss at some point?

A He would have still contributed to the plan. The plan would have paid up to $45,000, and the stop-loss would have kicked in.

Q There is no question Mr. Pidal cost your company money by getting sick?

A Everybody -- no, that's not true.

Q Well--

A Mr. Pidal was working for us. he cost us $110 a month toward his health care premium equivalent. That's what he cost us.

Now, the plan is a separate thing out here and the plan is there for just what it does. We contribute, the employee's contribute.

Q I am not --

THE COURT: Excuse me. Let the witness finish.

BY MR. MANZINI:

Q I apologize. Were you finished?

Is it correct this analysis establishes what the dealership pays out of their pocket for health care?

Is that correct?

A Yes -- for employees.

Q Regardless of what happens to Mr. Pidal, this analysis as to what the company pays, remains the same, correct?

A Yes.

Q And what the company pays is 100 per cent, totally determined by you and Greg Wurl?

A Yes.

Q Regardless of how many claims Mr. Pidal has, correct?

A Yes.

MR. QUINTON: I have no further questions, Judge.

THE COURT: You are excused, sir.

(Witness excused)

THE COURT: Call your next witness.

MR. HUDSON: Your Honor, the defendant calls Ms. Debra Bower.

DEBRA BOWER, DEFENDANT'S WITNESS, SWORN

MR. TYLER: Your Honor, my name is Donald Christopher tyler. I am a senior trial attorney with the United States Employment Commission, to represent the Commission's interest.

DIRECT EXAMINATION

BY MR. HUDSON:

Q Tell the Court your name for the record.

A My name is Debra Bower.

Q Are you employed?

A Yes, I am.

Q Where to you work?

A At the Equal Employment Opportunity Commission.

Q Could you tell the jury just, generally, what is the Equal Employment Opportunity Commission?

A Sure.

We are a Federal agency that's empowered by the Government to investigate charges of employment discrimination.

THE COURT: Excuse me.

Please, have a seat, counsel.

MR. TYLER: Okay, where?

THE COURT: In the audience.

MR. TYLER: If I need to make an objection --

THE COURT: No, sir. You are not a party to this litigation. Please have a seat.

MR. TYLER: Can I --

THE COURT: Sir, have a seat.

Next question.

BY MR. HUDSON:

Q Continue.

A The basis upon which people can file claims of

Number one, the testimony of George Mas.

Ladies and gentlemen, if there was a totally truthful witness you have heard from this trial, it is Mr. Mas.

Mr. Mas gets nothing for having been here those two days. Mr. Mas is not related to Mr. Pidal. Mr. Mas is not Mr. Pidal's friend. Mr. Mas was his immediate supervisor. He was quite happy with Mr. Pidal's work performance for a period of approximately 1 year until Mr. Pidal became ill.

I want to read to you from the testimony. We had it typed up over the weekend. I want to use it to remind you what Mr. Mas testified to. Please listen, if you will, to his specific answers. His testimony is the most valuable you have before you in helping you decide what happened

here. He was his immediate supervisor. He was at all times in charge of overseeing Mr. Pidal's work. This is what he said:

"Q Does that refresh your memory as to when the subject of Mr. Pidal's ultimate termination from the company was first brought up?

"A Yes.

"Q When was it first brought?

"A It was nearing, I am guessing July" --

Before Mr. Pidal went back to work, they were already talking about firing him, long before he was accused

of having a beer.

"A -- because I am not very good with dates," he says.

"I am guessing it was a few weeks prior to August, when I know he had contacted me, Mr. Pidal, before returning.

"Q It was before he went back to work?

"A Yes."

Ladies and gentlemen, how do they expect you to believe they did not have the intention in mind to let him go, when several weeks, or even before Mr. Pidal returned to work, August 3, in July, they are having these managers meetings and discussing how they would get rid of him?

"Q Who brought up the idea of firing him?

"A I don't exactly recall. It would have to be, just because of, typically, how it worked, it would have

to be one of the manger. It was either the general sales manager, Len Victor or Mr. Wurl.

"Q Do you recall what was said about terminating him or getting rid of him?"

Again, ladies and gentlemen, this is a month before the so-called beer incident.

"A I recall it was a dilemma as far a bringing him back, Mr. Pidal, because of a third porter, because also, they wanted to make sure that his health was good,

et cetera."

He goes on.

"Q Was there some resistance to bringing him back?

"A Yes.

"Q On whose part?

"A Mr. Wurl's."

Mr. Wurl was the owner who subsequently died.

As you know, Mr. Williamson took over his participation in the company.

"Q On whose part was there resistance to bringing him back?"

"A I would say it was Mr. Wurl or Mr. Victor, the general sales manager

"Q Why were they resisting the idea of bringing

him back?

"A Again, because of the extra employees, again, also, the health insurance problem.

"Q What was the health insurance problem, so that the jury and the Court can hear it.

"A As always, things were discussed.

"There was a concern that he had cost the company a lot of money" --

That's the meat of the company, right there.

"A -- and it was, you know, he wasn't maybe not

healthy in order to come back or to continue to work and that he may get sick again or something."

Obviously, that was all happening, ladies and gentlemen, several weeks or possibly even a month before Mr. Pidal even came back to work.

They were already discussing, "how do we get rid of him because of what he is costing us?" -- excuse me for sweating too much -- "we have this other porter, Lewis, 27 years old. He is not likely to be sick. 27 years old are presumed, in our society, to be healthier than 62 year old.

"Q Whose idea was it to get a doctor's release?

"A Mr. Wurl.

"Q Did you expect Mr. Pidal to be able to get a release?

"A In my own heart" -- this is Mr. Mas talking --

I did not think he would get a release.

"Q Did you think, at the time, by asking him to get a release that that would end the subject, that that would close the book, if you will, on Mr. Pidal's future employment with the company?

"A I brought it to their attention.

'Mr. Pidal wants to return to work. What do you guys want to do? Do you want him back?'

"Q Did you think it was fair that they wanted to terminate Mr. Pidal?"

This is Mr. Pidal's supervisor, who was also working at Williamson, supervising Mr. Pidal.

"A I, personally, did not think it was fair.

"Q Did you think they had another reason for wanting to terminate him?

"A In my mind, I thought the possibility existed for another reason.

"Q What was the other reason?

"A They had a dilemma on their hands with a third porter and they had a few reasons why they didn't want him working there. That would be a good one.

"Q What were the reasons? I want you to be specific so that the jury can hear it.

"A That there was a third employee, and they were concerned about their health costs.

"Q Because of why? Why were they concerned about their health costs?

"A Because Mr. Pidal had just had a heart attack, and his age, et cetera."

Age and disability.

"Q Do you know of other employees at Williamson that drank while on their lunch or dinner break?"

MR. QUINTON: Counsel, can you identify the page?

MR. MANZINI: Page 24.

Excuse me, ladies and gentlemen.

the truth, he said, more than anything else. This is what you should consider, primarily, when you go into your deliberations.

The fact still remains that Mr. Pidal had heart illness, which led to a heart attack, which held to a quadruple heart bypass surgery on March 3, 1992, and he was away from work for 6 months. 30 days after he got sick, they cut him off of that insurance. They made him pay for it. It was $387 a month. How is a man with no income going to pay for insurance of $387 a month?

What that meant was, that effectively, 30 days after he got sick, Mr. Pidal had no medical insurance. That's why he racked up bills, thousands of dollars in expenses, which I will discuss in a brief moment.

When he asked to come back to work, they put up a roadblock. They said "now, get us a doctor's release.

You heard Mr. Mas' testimony. The expectation was, there would be no doctor's release. That would end the subject, close the book. There's no way this man is going to be allowed to come back to work at age, at the time, 60, having had this heart attack and open heart surgery.

Much to their surprise, and much to their sadness he came up with this release. Once they had the release they couldn't ignore him. They had to put him back to work.

On the second day after having worked 11 and 12

that, you must consider all of the evidence. I do not mean you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say and how important that testimony was.

In making these decisions, you may believe or disbelieve any witness in whole or in part.

Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary

In deciding whether you believe or do not believe any witness, I suggest you ask yourself a few questions:

Did the person impress you as one who is telling the truth?

Did he or she have particular reason not to

tell the truth?

Did he or she have a personal interest in the outcome of the case?

Did the witness seem to have a good memory?

Did the witness have the opportunity and ability to observe accurately the things that he or she testified about?

Did he or she appear to understand the questions clearly and answer them directly?